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No. (1) 091242

Supreme Court, U.S.
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In The

Supreme Court of the United States

DONALD W. BAIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Eighth Circuit is circumventing the rule of *Rita* by presuming the sentencing judge correctly understood and applied the law, when the record plainly shows the judge misstated and misunderstood the rule.

2) Whether the Eighth Circuit is circumventing the rule of *Gall* by creating its own preservation of error requirement that disavows the force of Rule 51(b) of the Federal Rules of Criminal Procedure.

3) Whether Judge Jarvey's sentencing was unreasonable because he erroneously concluded Section 2G2.2 enhancements were based upon careful study by the Sentencing Commission, and the enactment of those enhancements violated the Doctrine of Separation of Powers.

PARTIES TO THE PROCEEDING

Petitioner (Defendant and Appellant below):

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Respondent (Plaintiff and Appellee below):

THE UNITED STATES OF AMERICA

Represented by the Solicitor General

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PETITION FOR SECOND WRIT OF CERTIORARI

Petitioner Donald W. Bain, Jr. respectfully prays that a Second Writ of Certiorari issue to review the judgment below, and in addition, Petitioner prays the Court summarily order the Circuit Court to remand this action to the District Court for a new sentencing.

CITATIONS FOR OPINIONS BELOW

The second judgment of the United States Court of Appeals now challenged appears in the Appendix [App.], beginning at page 1. It is published at *U.S. v. Bain*, 586 F. 3d 634 (8th Cir. 2009). That decision resulted after this Court's grant of Certiorari and remand to the Eighth Circuit in *Bain v. U.S.*, 129 S.Ct. 2157 (2009). This Court reversed the same Eighth Circuit panel's first *per curiam* opinion that is published at *U.S. v. Bain*, 537 F. 3d 876 (8th Cir. 2008). It appears in the Appendix, beginning at page 24. The judgment of the District Court was not published. The full sentencing transcript is attached hereto in the Appendix beginning at page 46.

BASIS FOR JURISDICTION IN THIS COURT

This Petition arises from a direct appeal that granted final and full judgment against Petitioner. The action is on a criminal prosecution the Government initiated under 18 U.S.C. §§2252(a) and 2256.

Petitioner pled guilty to one count of receiving and distributing child pornography and one count of possession of child pornography. The District Court imposed a sentence of 210 months imprisonment. (App. 60)

The Eighth Circuit affirmed in an opinion filed August 8, 2008. (App. 24) After this Court reversed and remanded, another opinion was filed in the Eighth Circuit on November 16, 2009. (App. 1) A petition for rehearing was again denied by a ruling filed January 13, 2010. (App. 66) Jurisdiction in this court is under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Constitution of the United States:

Amendment 5

> No person shall be . . . Deprived of life, liberty or property without due process of law. . . .

United States Code:

18 U.S.C. §687; Federal Rules of Criminal Procedure:

Rule 1

> (1) **In General**. These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme

Court of the United States. (Rule 1(1) F.R.Cr.P.)

Rule 51

RULE 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court when the court ruling or order is made or sought – of the action the party wishes the court to take, **or** the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

18 U.S.C. §3742(f)(1):

(f) **Decision and disposition.** – If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

STATEMENT OF THE CASE

The Government obtained an Indictment against Mr. Bain and filed it in the Southern District of Iowa on December 14, 2005. In Count I, the Indictment charged Receiving and Distributing Child Pornography in violation of 18 U.S.C. §§2252(a)(2) and 2256. Count II charged Possessing Child Pornography in violation of §§2252(a)(4)(B) and 2256. Mr. Bain entered open pleas of guilty to both counts on December 13, 2006. The action proceeded to sentencing before the Honorable John A. Jarvey on August 9, 2007. The judge imposed a sentence of imprisonment on Count I for 210 months and 120 months on Count II, to be served concurrently. (App. 60)

Donald W. Bain, Jr. was born in 1959, and he grew up in the relatively small town of Iola, Kansas. His father was a teacher, school principal, and superintendent of the Iola schools. His mother worked some part-time jobs, "but was mainly a stay at home mother." Petitioner Bain described his mother as an emotional person who "put a lot of stock in her faith." His childhood was stable and his family relationships were warm. He "has maintained very close relationships with his three sisters." Although his father was often absent while pursuing his professional duties, Mr. Bain developed a great deal of respect toward his father's devotion to his profession. He told the presentence investigator "that he had a lot of respect for his father's knowledge and the pride he took in his job as an educator, school principal, and superintendent." (Presentence Investigation Report [PSIR], 12-13)

Not surprisingly, Mr. Bain's school years were marked by several accomplishments. He was a student council president. Don was an active participant on the track, baseball, football and basketball teams, as well as other school sponsored activities. After high school, he attended junior college in Iola, and finished with a 3.11 grade point. From there, he went on to the University of Kansas to earn degrees as both a Bachelor of Architecture and a Bachelor of Environmental Design. Through the years, Don obtained architectural licenses in Arizona, California, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Ohio and New York. (PSIR, 13, 17)

While Don was in college, he started dating Lynda. They have now been married since 1989. Lynda had two children from a previous marriage. "According to Lynda, her children were young adults when she [married] the defendant, but the defendant has always been a second father to them and her children 'love the defendant dearly.'" (PSIR, 13-14) In 2001, Don took a position as an architect with Stanley Consultants, and he and Lynda moved to Muscatine, Iowa. (PSIR, 17) The Indictment in the instant action covered conduct from 2001 to February 9, 2005. (Indictment, 12/14/05). On February 9, 2005, federal agents executed a search warrant at Don and Lynda's home in Muscatine. Don was immediately cooperative with agents and answered their questions as to how he got started in viewing child pornography on the Internet. It had been about a year and a half at that point since he had begun downloading images on his

computer. He told the agents exactly how he had obtained the images, and he told them he had not downloaded anything in the few months before that February, 2005 interview. The agents seized a laptop computer, two towers and some disks. (PSIR, 4-5) It was over ten months before Mr. Bain was indicted.

At his Initial Appearance on December 30, 2005, Magistrate Judge Thomas J. Shields released Mr. Bain on pretrial release with supervision and an unsecured appearance bond. (Order Setting Conditions, 12/30/05). He continued his employment with Stanley Consultants. On January 23, 2006, Mr. Bain voluntarily met with an FBI special agent to offer all the information and assistance he could in regard to the ways in which child pornography is found and traded on the Internet. "Bain stated he only traded child pornography files from his home and never exposed any members of his family to these files." He never purchased or sold any of the images. It was all obtained and re-distributed by downloading and file sharing on the net. (PSIR, 6-7, 9-10)

Mr. Bain told the FBI his downfall evolved from his fascination with the Internet. His explanation and description of his conduct was extensive, not only to the FBI, but also to the presentence investigator, two psychologists and the sentencing judge. Judge Jarvey referred to the psychologists' evaluations as a "psychosexual investigation" and stated he would "rely heavily" on those reports in selecting the sentence. (App. 36) That investigation was initiated by Dr. David

McEchron, Ph. D. The presentence investigator summarized the doctor's diagnosis:

> In Dr. McEchron's opinion, the defendant "qualifies for diagnoses of Adjustment Reaction with Mixed Features of Anxiety, Depression, and Paraphilia, NOS," but does "not meet the criteria for a diagnosis of pedophilia" and does not appear to present a significant risk to the community at large. Based on the various risk protocols applied to the defendant, Dr. McEchron believes the defendant falls in the low risk category for re-offense. (PSIR, 16)

The Government later hired a psychologist to conduct an evaluation of Mr. Bain. That psychologist returned the same diagnosis and prognosis of low risk of recidivism. (PSIR, 17-18) Mr. Bain wandered into his crimes initially through what could only be described as an obsession with the Internet. He told the presentence investigator that, prior to the Search Warrant, he was spending two to three hours per night on the net. He originally had perused sites that dealt with violence and death, and was in related chat rooms exchanging files. The child pornography first appeared to him as it was intermingled with violence files. He then explored pornographic sites. Don told the FBI, on the day the search warrant was executed, that he "was flabbergasted that this stuff existed." He said "he got carried away in seeing how far it would go." (PSIR, 5, 9) Other than the instant case, Mr. Bain has **no** juvenile or adult criminal history. (PSIR, 11-12)

Mr. Bain eventually explained to the sentencing judge that he did not collect these images out of sexual stimulation, rather "it was more utter dismay of wondering how far this information would go." He told the judge, "I was astonished by it. I was intrigued by it. I was passing a wreck on the freeway." (App. 55) In another analogy, Don told the presentence investigator "the images were similar to pieces of paper or trash on the street that he picked up and looked at. He discarded them and others picked them up." Similarly, when first confronted by the FBI at his home, he told the agents the images didn't mean much to him, and he could immediately stop the conduct. (PSIR, 5, 9) Mr. Bain's explanations of his offenses are all consistent with the psychosexual investigation Judge Jarvey relied heavily upon. The testing and protocols disclosed there was no pedophilia and a low risk for re-offense. (PSIR, 16)

At sentencing, Petitioner's attorney offered an extensive summary to show that Mr. Bain had been completely reliable and responsible toward the Government since the day the FBI knocked on his door. He had virtually traveled around the world in the pre-indictment and pretrial phases of the case, and always complied with all requirements of supervision. He had done everything possible to attempt to assist the FBI to investigate the ways child pornography is traded on the Internet. He was a man who had no criminal history. Experts hired by both parties determined there was no evidence Don was a predator. He was losing a great career and a wonderful family life.

Don, quite obviously, would never commit another crime. His attorney told Judge Jarvey there was no necessity to impose any imprisonment beyond the 60 months minimum mandated by statute, and he requested that sentence. The first four words out of the judge's mouth were, "I can't do that." He went on to explain the constraints of the presumption of reasonableness and the Extraordinary Circumstances Test. (App. 48-53) After the prosecutor told the judge the Government would be "content" with a sentence at the bottom of the Guidelines range, the judge imposed the minimum recommended by the range – 210 months. (App. 58-60) The Eighth Circuit affirmed.

This Court directed the Eighth Circuit to reconsider its decision in light of *Nelson v. United States*, 129 S.Ct. 890 (2009). The *Nelson* decision came down after Mr. Bain filed his first Petition for Writ of Certiorari in No. 08-820, but before the Government filed its Brief in Opposition in April of 2009. In his Reply Brief, Petitioner started out by noting the Government had cited three decisions this Court issued in the first few months of 2009. The Government had avoided any mention of this Court's decision in *Nelson*, however. (08-820, Reply Br. 4/17/09, p. 1) Instead, the Government simply argued Judge Jarvey had not applied a presumption of reasonableness in his pronouncement, but rather his statements "are most naturally read as simply acknowledging the *appellate* presumption of reasonableness." (Br. In Opp. 4/3/09, p. 8) (emphasis added) After this Court's May 4, remand, the Eighth Circuit panel considered the

case submitted June 9, 2009. The Court had not requested any additional arguments from the parties. A little over five months later, the same appellate panel again issued a decision that was identical to its reversed decision except for changes made in two paragraphs of a 16-page slip opinion. (App. 7-8, 29-30) The panel did mention *Nelson*, but took the same tack the Government had taken in resisting Certiorari. In reviewing what Judge Jarvey said at sentencing, the panel decided: "These statements merely recognize that a sentence within the Guidelines range is presumed reasonable at the appellate level." (App. 7) Mr. Bain pointed out in his Second Petition for Rehearing in the Eighth Circuit that the panel was relying on the same explanation the Government had unsuccessfully advanced in its attempt to defeat Certiorari. Petitioner pointed out that if that explanation were valid, this Court would not have granted Certiorari and reversed the action. (Pet., 8th Cir. No. 07-2981, 11/23/09, p. 6) The Petition was denied, but this time around, two judges voted in favor of an *en banc* review.

Strangely, Judge Benton this time voted against *en banc* proceedings. After the panel's 2008 decision, Judge Benton had been the lone judge to vote in favor of *en banc* review. That made sense because he wrote the concurrence that opined Mr. Bain should get a new sentencing. In the second decision challenged by the instant Petition, Judge Benton's concurrence remains intact. After that decision, however, Judge Benton has now voted against *en banc* review. There

is no logical or reasonable explanation for his change in vote. (App. 18, 65-66) This little paradox only adds to the mass of evidence set out below concerning judicial maneuvering in the Eighth Circuit that breeds among the public a disrespect for the law.

REASONS FOR GRANTING CERTIORARI

The Eighth Circuit has shown a continuing recalcitrance toward this Court's authority, and a belligerence toward the rule of law in reviewing sentences.

One week to the day after this Court ordered remand in the instant case, that two-sentence decision granting Certiorari was cited in the Northern District of Iowa. The Honorable Mark W. Bennett cited Petitioner Bain's case as the most recent in a long series of cases where this Court had thrown out sentencing policies and rules of review the Eighth Circuit had developed or embraced. What stunned Judge Bennett in *U.S. v. Ingram*, 613 F. Supp. 2d 1069 (N.D. Iowa 2009) was the way the Eighth Circuit had gone about sending the case back to him for resentencing *sua sponte*. The Eighth Circuit reversed Judge Bennett's original sentence on the Government's appeal, but did so on an issue the Government had not raised or argued. Although Judge Bennett dutifully complied with the appellate panel's instructions, he found it necessary to first comment on the panel's plain violation of the rules and doctrines of error preservation and "party presentation." Judge Bennett is not a

typical District Court judge when it comes to knowledge of proper appellate procedure. He was writing from the perspective of a judge who had at times sat by designation on panels in the Eighth Circuit. He had not only heard appeals, he had authored extensive and highly analytical decisions for the Eighth Circuit. (*See U.S. v. Beck*, 140 F. 3d 1129 (8th Cir. 1998). Though his criticism of the Eighth Circuit was certainly not necessary to his decision on resentencing, Judge Bennett believed a lengthy record needed to be made, in a published decision, to document the ongoing and unwavering unfairness the Eighth Circuit has shown toward criminal defendants on sentencing issues:

> As explained above, one of the reasons for this written ruling is to register respectful disagreement with the appellate court's remand to give the prosecution a "second bite at the apple" to try to prove defendant Ingram's alleged prior felony drug conviction. The appellate court's remand for such a second bite is troubling, because giving the prosecution a second bite at the apple, on grounds that the prosecution never raised in its appellate briefs, eviscerates several long-standing, bedrock principles of appellate review, including the doctrines of "plain error" and "party presentation"; creates out of thin air a "bailout" not requested by the prosecution; is unsupported by any precedent in this Circuit or anywhere else; is unsupported by any conceivable analogue in criminal law (or civil law, for that matter); is inconsistent

> with the plain language of 21 U.S.C. §851, and thus contravenes the intent of Congress; and is inconsistent with the record and the facts in this case, ignored or overlooked in the *per curiam* opinion, concerning when the prosecution not only should have known but actually knew that Ingram's prior conviction was in dispute. For each of these reasons, and in the context of a recent string of eleven reversals of the Eighth Circuit Court of Appeals by the United States Supreme Court on sentencing issues on which the Eighth Circuit Court of Appeals had erroneously tilted in favor of the prosecution, the appellate court's *sua sponte* review and remand in this case are deeply troubling. 613 F. Supp. 2d at 1079.

Judge Bennet then explained at length how the Eighth Circuit had broken its own rules in acting *sua sponte* to direct a new proceeding to allow the Government to present more evidence to support a more punitive sentence. In particular, the judge pointed to *Greenlaw v. United States*, 128 S.Ct. 2259 (2008), where this Court reversed the Eighth Circuit for taking *sua sponte* action directing the District Court to increase the defendant's sentence by 15 years. The remand came after *only* the defendant has appealed. This Court enforced the bedrock rule by simply saying, "absent a government appeal or cross-appeal, the sentence Greenlaw received should not have been increased." 128 S.Ct. at 2562.

At 613 F. Supp. 2d 1069, 1084-86, Judge Bennett chronicled the overwhelming "tilt toward the prosecution" in the Eighth Circuit and began with this Court's decision on Mr. Bain's first Petition.

After *Gall v. U.S.*, 552 U.S. 38, 128 S.Ct. 586 (2007) was filed, Mr. Bain's appellate counsel filed a proper Citation of Supplemental Authority on December 20, 2007, to direct the appellate court's attention to *Gall*. In the instant case, the panel acknowledged this Court had struck down the Eighth Circuit's use of an Extraordinary Circumstances Test in the *Gall* decision. While acknowledging the instant case had gone to sentencing four months before this Court's *Gall* decision, the panel found the *Gall* error in Petitioner Bain's sentencing had not been properly preserved for review. (App. 7-9) The panel determined there was "plain error" on the *Gall* violation, but decided Petitioner Bain had not established prejudice. On that plain error review, the three-judge panel determined Mr. Bain could not show there was a reasonable probability he would have received a lighter sentence absent the *Gall* error. (App. 10-12) This was a sentence of almost 17 years imprisonment for a 48-year-old man who had absolutely no criminal history, who committed the crimes in the privacy of the basement of his own home and never did anything beyond looking at and sharing pictures. The sentence was affirmed. (App. 20)

The sentencing proceeded less than two months after this Court's decision in *Rita v. U.S.*, 551 U.S. 338, 127 S.Ct. 2456 (2007). Prior to his *Gall* error,

and afterward, Mr. Bain's sentencing judge very plainly stated his misunderstanding of the *Rita* holding. The judge stated this Court held the Sentencing Guidelines are presumptively reasonable. The judge also incorrectly stated that the law in the Eighth Circuit also presumed the Guidelines are reasonable. He did not understand that the presumption of reasonableness is strictly an appellate standard he was not authorized to employ. He misunderstood the rationale of *Rita*. The decision does not find the Guidelines presumptively reasonable. The *Rita* decision allows an appellate court to presume a sentence is reasonable if a judge's independent assessment of a proper sentence under 3553(a) happens to fall within the range designated by the Guidelines. The rationale for the presumption is that two evaluators have independently found a proper sentence to be within the same range. In the face of the sentencing judge's plainly incorrect understanding of *Rita*, the Circuit improperly relied on a presumption that the trial judge knows and correctly applies the law. The Circuit did not use this presumption just as a starting point for analysis of the *Rita* error. The panel used it as the starting *and* the end point. This plainly incorrect application of a presumption could be used to defeat any and every legal error trial judges make. Even though the judge states the law incorrectly, we can presume he correctly understood and applied the law?

The procedural device the Eighth Circuit has employed in the wake of *Rita* and *Gall* defies the

authority of the Federal Rules of Criminal Procedure. The panel ruled Mr. Bain did not preserve the assignment on the *Gall* error because his lawyer did not make a specific objection to the use of the Extraordinary Circumstances Test. As stated above, Petitioner's sentencing was four months before the *Gall* decision was filed in this Court. Mr. Bain's position on appeal was that his lawyer preserved all assignments on sentencing simply by telling the judge exactly what he wanted, i.e., the statutory minimum sentence of 60 months imprisonment. Rule 51(b) allows a party to preserve error by telling the judge what action he wants the judge to take **or** by objecting to the action the judge has taken. The panel acknowledged Petitioner's position on Rule 51(b) in a footnote, but made no relevant analysis. The panel simply stated the Eighth Circuit requires an objection to be made to preserve *Gall* error. A circuit court has no authority to make its own local rules that contravene the Federal Rules of Criminal Procedure. (App. 10-11, 32-33)

The Eighth Circuit is simply refusing to abide by *Rita* and *Nelson*, and refusing to abide by *Gall*.

1. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *RITA* BY PRESUMING THE SENTENCING JUDGE CORRECTLY UNDERSTOOD AND APPLIED THE LAW, WHEN THE RECORD PLAINLY SHOWS THE JUDGE MISSTATED AND MISUNDERSTOOD THE RULE.

In *Rita v. U.S.*, 551 U.S. 338, 127 S.Ct. 2456 (2007), the Court held it is permissible for an appellate court to employ a presumption of reasonableness. If a sentencing judge reaches an independent conclusion that a particular sentence is sufficient and necessary, and the terms also happen to fall within the range identified by the Guidelines, an appellate court may begin its review by presuming the judge's sentence is reasonable. At the same time, the Court determined a proper and independent evaluation of 18 U.S.C. §3553(a) factors does not allow a sentencing judge to employ that presumption. 551 U.S. at 347-51, 127 S.Ct. at 2462-65. Stated differently, the presumption of reasonableness does not presume the Guidelines are reasonable. It presumes the sentence a judge has selected through an independent and full evaluation is reasonable.

In *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007), the Supreme Court reviewed the Eighth Circuit's decision reversing another sentence out of the Southern District of Iowa, imposed by the Honorable Robert W. Pratt. Following *Booker*, Judge Pratt had weighed the statutory sentencing factors in a drug conspiracy case. The undisputed Guidelines

range was 30 to 37 months in prison. After a careful and detailed analysis, Judge Pratt determined imprisonment was not "necessary" and ordered Mr. Gall serve 36 months of supervised probation. The Eighth Circuit had reversed the sentence by deciding Judge Pratt had violated the Extraordinary Circumstances Test. The Court had ruled the variance from the low end of the Guidelines range at 30 months to no incarceration at all was a 100 percent variance, an "extraordinary" variance, that was not justified by any "extraordinary circumstances." *Gall*, 552 U.S. at 43-45, 128 S.Ct. at 593-94.

The *Gall* court began by pointing out the Eighth Circuit's minute re-examination and revision of Mr. Gall's sentencing factors was not sufficient to reach the conclusion Judge Pratt abused his sentencing discretion. That was the standard of review dictated by the explanation of the "reasonableness" review explained in *Booker*.

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. 128 S.Ct. at 594-95.

The *Gall* court was also impressed by Judge Pratt's reasoning that explained the assurance of respect for the law is not always achieved by imposing the most punishment possible:

> Moreover, the unique facts of Gall's situation provide support for the District Judge's conclusion that, in Gall's case, "a sentence of imprisonment may work to promote not respect, but derision of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." 128 S.Ct. at 599.

There is no logic in assuming respect for the law will continue to increase *ad infinitum*, as the punishment for a particular offense continues to increase. Subsection 3553(a)(2)(A) does not seek respect for punishment, it seeks respect for the law. As the Preamble to our Constitution states a primary objective of our law is "to establish Justice," it is clear Congress's intent, in promoting respect for the law, is defined as promoting respect for Justice. The statute ensures justice by directing judges to impose a sentence that is "sufficient, but not greater than necessary."

> If we desire respect for the law, we must first make the law respectable.
>
> – Louis D. Brandeis –

The undisputed calculation of the Guidelines range applied to Mr. Bain in the PSIR was for imprisonment from 210 to 262 months. (PSIR, 21)

(App. 25) When the defense attorney requested Judge Jarvey impose only the statutory minimum imprisonment of 60 months, the judge himself objected:

> **THE COURT**: I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. (App. 52)

The *Rita* decision specifically warned trial level judges that they were not to consider a presumption of reasonableness in determining sentences:

> We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. *Rita*, 127 S.Ct. at 2465, citing *Booker*, 543 U.S. at 259-60, 125 S.Ct. at 738 (emphasis supplied).

It is not surprising that the judge incorrectly believed *Rita* had deemed the Guidelines scheme itself to be presumed reasonable. The Eighth Circuit had been making that error prior to *Rita*. *See U.S. v. Likens*, 464 F. 3d 823, 825 (8th Cir. 2006): "The guideline range though advisory is presumed to be reasonable." The Eighth Circuit has now twice refused to acknowledge that Judge Jarvey incorrectly stated the rule of *Rita*. (App. 7, 29) Judge Jarvey's words were

perfectly clear. He obviously misread *Rita* to conclude he was to presume the Guidelines range was reasonable, and then work from there. The timing of Judge Jarvey's erroneous pronouncement also shows his application of the presumption. It is not clear whether the defense attorney was done with his argument when Judge Jarvey interjected with the presumption and his ruling that in order to go below the Guidelines range, "there's got to be a ground for a variance." The judge's use of the phrase "Hang on," indicates the attorney was not done. (App. 52) The judge had not yet heard from Mr. Bain in allocution, nor had he heard from the prosecutor. The adversarial process had not been completed when the judge announced the presumption.

Later, in reciting the many factors he considered, the District Court judge again pronounced: "The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals [sic]." In a telling omission in the pronouncement that followed, Judge Jarvey said that Mr. Bain's sentence at the bottom of the Guidelines range was "sufficient to address the essential sentencing considerations." The judge left out his opinion as to whether the sentence was not greater than necessary. (App. 36-37)

The Eighth Circuit panel avoided the *Rita* error in Mr. Bain's sentencing by saying it just did not see any error:

> Presumably, the district court realized that the presumption of reasonableness is only an

> appellate presumption, and this was its meaning when it stated the guidelines are presumed reasonable in the Eighth Circuit, as affirmed by the Supreme Court. (App. 6)

Judge Jarvey clearly stated his misunderstanding of *Rita* and clearly erred in these three particulars:

> (1) "I can't do that. Hang on. In order to go below the Guidelines . . . there's got to be a ground for a variance. . . . (App. 52)
>
> (2) "[T]he Guidelines . . . are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable . . . (App. 52); and
>
> (3) "The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals." (App. 59)

Incredibly, the Eighth Circuit has now said, "Unlike *Nelson*, the sentencing judge's statements here do not indicate that he presumed the Guidelines range reasonable." (App. 7)

The Eighth Circuit used the Extraordinary Circumstances Test to thwart the relief from mandatory Guidelines that this Court had plainly and thoroughly mandated in *Booker*. The Eighth Circuit has now thwarted the relief this Court provided in *Rita*. "In light of *Rita*, the district court's application of a presumption of reasonableness was a significant procedural error." *U.S. v. Greene*, 513 F. 3d 904, 907 (8th Cir. 2008).

2. THE EIGHTH CIRCUIT IS CIRCUMVENTING THE RULE OF *GALL* BY CREATING ITS OWN PRESERVATION OF ERROR REQUIREMENT THAT DISAVOWS THE FORCE OF RULE 51(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

It is only when the court of review finds no procedural defect that it may move on to evaluate the sentence for substantive reasonableness:

> **Assuming that the district court's sentencing decision is procedurally sound,** the appellate court should **then** consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance. *Gall*, 128 S.Ct. at 597 (emphasis added).

This holding amplified the *Rita* explanation that a judge does not need a certain, single ground for a sentence below the Guidelines range. Judge Jarvey obviously thought he needed that one shining reason for any variance to overcome the presumption of reasonableness. More importantly, the emphasized language above shows the Eighth Circuit was not authorized to review the sentence for reasonableness once it identified the *Gall* error. The Eighth Circuit now treats claims of significant procedural error in

sentencing as subject to a strict preservation of error standard requiring a specific objection. On the other hand, the Circuit believes no objection is necessary for a defendant to gain a review for substantive reasonableness. (App. 9, 14, 31, 35-36) The *Gall* decision does not authorize treating procedural reasonableness any differently than substantive reasonableness. *Gall*, 522 U.S. at 51, 128 S.Ct. at 597. The panel did agree with Petitioner that there was *Gall* error. After "presuming" there was no *Rita* error, the panel's comment on the presumption of reasonableness was strangely intertwined in its analysis of the Extraordinary Circumstances issue:

> The fact that the district court twice mentioned the appellate presumption of reasonableness reinforces that it felt constrained by this circuit's (then) strict percentage review, and did not independently consider Bain's arguments that a 60-month sentence was sufficient but not greater than necessary to meet the sentencing goals of §3553. *See Gall*, 128 S.Ct. at 595, 597. (App. 9)

So, after "presuming" Judge Jarvey correctly understood the proper appellate application of the presumption of reasonableness should not affect his independent evaluation of §3553(a) factors, the panel then said the references to the presumption of reasonableness show the judge "felt constrained." The Tenth Circuit has observed a judge's reference to the presumption of reasonableness is especially suspect if he then imposes a sentence at the bottom the Guidelines

range. "The defendant was sentenced at the very bottom of his advisory guideline range, a sign we have taken in the past to indicate the court may have done something differently had it not felt mistakenly bound by the guidelines." *U.S. v. Conlan*, 500 F. 3d 1167, 1170 (10th Cir. 2007). Was the presumption off reasonableness having an improper effect on Judge Jarvey's sentencing evaluation? Yes, it was, and so was the Extraordinary Circumstances Test. The quote above shows the panel knew Mr. Bain's sentence was defective in two significant procedural errors, but chose to do nothing about it.

Prior to *Gall*, the Eighth Circuit viewed 18 U.S.C. §3742(f)(1) as a mandate requiring remand. That subsection provides:

> (f) **Decision and disposition.** – If the court of appeals determines that –
>
> (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.

In *U.S. v. Mashek*, 406 F. 3d 1012 (8th Cir. 2005), the Court explained that it would not be at liberty to affirm a sentence that ran afoul of the foregoing statute. The Court could *not* determine the sentence was reasonable, and affirm it in spite of the error:

> The duty to remand **all** sentences imposed as a result of an incorrect application of the

> guidelines exists independently of whether we would find the resulting sentence reasonable under the standard of review announced in *Booker*. ***Mashek***, 406 F. 3d at 1012 (emphasis added).

The panel determined Mr. Bain was sentenced in violation of *Gall*. Of course, the record also plainly shows Judge Jarvey also violated *Rita*. The panel refused to explain why these violations and the resulting incorrect application of the Guidelines did not mandate remand in the instant case. The statute and the Circuit's language in the quote above show this error is not to be treated with any facile applications of technical rules of error preservation.

The majority in the instant case, avoided the grant of relief on the *Gall* issue by excising the first half of the first sentence of Rule 51(b) of the Federal Rules of Criminal Procedure. The rule provides:

> **RULE 51.** Preserving Claimed Error
>
> **(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.
>
> **(b) Preserving a Claim of Error.** A party may preserve a claim of error by informing the court when the court ruling or order is made or sought – of the action the party wishes the court to take, **or** the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not

> later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103 (emphasis added).

The panel has given no effect to the "or" that is emphasized above. The Eighth Circuit wants trial lawyers to make appellate arguments, but the rules do not require that, and the Federal Rules cannot be abrogated by local rules. In fact, the Eighth Circuit's rule requiring a lawyer to make a specific objection after he or she has already stated the sentence sought also violates Rule 51(a) because it amounts to requiring an exception to the ruling. The Federal Rules of Criminal Procedure were adopted by the Supreme Court's order of December 26, 1944, pursuant to 18 U.S.C. §687. The Rules are the law of the land in the federal courts. The various federal courts cannot make their own local rules that are inconsistent with those of the Supreme Court and Congress. Rule 1 dictates:

> (1) **In General**. These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States. (Rule 1(1) F.R.Cr.P.)

In *Wingo v. Wedding*, 418 U.S. 461, 472, 94 S.Ct. 2842, 2849 (1974) the Supreme Court struck down a local rule that allowed a Magistrate Judge to conduct evidentiary hearings in habeas actions. The Court found the rule violated 28 U.S.C. §2243 and the

Federal Magistrates Act. The local rule was invalid, as it was inconsistent with federal law. Similarly, the panel in the instant case has ruled this Circuit does not recognize the first half of the first sentence of Rule 51(b). If this is true, the local rule is inconsistent with Rule 51 and without authority. Review for plain error on the *Rita* and *Gall* issues in the instant case would be improper as defense counsel clearly informed Judge Jarvey of the exact ruling he was seeking at sentencing. (App. 51-52)

In the instant case, the basis of Judge Benton's concurrence was this:

> This case illustrates the difficulty of conducting substantive review, after a finding of *Gall* error. (App. 19)
>
> * * *
>
> Since this Court has no reliable basis for substantive review, this sentence should be reversed for resentencing in order to fulfill the mandate of *Gall*. (App. 21)

In a dissent in the Sixth Circuit, Judge Clay was joined by five other judges in concluding that Rule 51 requires a defendant to voice an objection to a calculation of the Guidelines range to preserve error on the calculation, but beyond that, Rule 51 does not "[impose] upon the defendant that further obligation to challenge the 'procedural reasonableness' of his sentence before the district court." *U.S. v. Vonner*, 516 F. 3d 382, 399, (6th Cir. 2008). This dissent stated it was a violation of "the most basic principles of

fairness and due process," to subject a procedural reasonableness challenge to plain error review. The dissent explained that *Booker, Rita* and *Gall* command a review of a sentence for reasonableness. Regardless of whether it is substantive reasonableness or procedural reasonableness, the only standard of appellate review is reasonableness. 516 F. 3d at 382. Indeed, how does an appellate court convince the public it is promoting justice if it engages in the hairsplitting of error preservation questions on fundamental procedural defects?

In a separate dissent in *Vonner*, Judge Moore was joined by four others. She wrote:

> The majority's plain-error analysis also deepens a growing circuit split that surely merits attention of the Supreme Court, and the majority fails to offer meaningful guidance to the district courts and litigants in the circuit. 516 F. 3d at 406.

That is the central reason this Court must act at this time. The circuits are all over the board with differing standards of review, and defendants are left with unfair sentences marked by appellate review abuses. *See Ingram*, 613 F. Supp. 2d at 1087, n. 6. The circuits are able to pick and choose where they want to grant relief by manipulation of the words spoken and a multiple choice of standards to employ.

It appears the Sixth Circuit would have reviewed Mr. Bain's claim of *Gall* error without resorting to a plain error review. The majority in *Vonner* explained

that the Sixth Circuit invokes the plain error standard on sentencing only when the sentencing judge asks the parties, after pronouncing the sentence, whether there are any objections to the sentence. Mr. Vonner's counsel had failed to respond to that question at the time of sentencing. 516 F. 3d at 385. In the instant case, Judge Jarvey did not ask whether there were any objections to the sentence.

In *Koon v. U.S.*, 518 U.S. 81, 100, 116 S.Ct. 2035 (1996), this Court said, "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." Erroneous legal conclusions are more likely to occur on procedural questions than substantive ones. The Court must mandate that all sentences marked by an abuse of discretion must be reviewed for reasonableness. The process cannot be diluted by the occasional use of alternate standards of review or presumptions of correctness. The process must be uniform and comport with Justice.

3. JUDGE JARVEY'S SENTENCING WAS UNREASONABLE BECAUSE HE ERRONEOUSLY CONCLUDED SECTION 2G2.2 ENHANCEMENTS WERE BASED UPON CAREFUL STUDY BY THE SENTENCING COMMISSION, AND THE ENACTMENT OF THOSE ENHANCEMENTS VIOLATED THE DOCTRINE OF SEPARATION OF POWERS.

The enhancements applied under Section 2G2.2(b), U.S.S.G., increased Mr. Bain's Offense Level in the

Guidelines by **eighteen**. From that enhancement package alone in Criminal History Category I, Mr. Bain's range went from a low end of **thirty months** at Level 19 to a low end of **two hundred ten months** at Level 37. (PSIR, 10-11) In imposing that latter period of imprisonment, Judge Jarvey said, "The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals. They are not mandatory, but they are based on extensive study and refinement." (App. 59)

The enhancements under 2G2.2(b) were not the result of study or refinement, and they were not reviewed or endorsed by the Sentencing Commission.

There is no doubt the sentence of **over seventeen years** is way beyond what is necessary to meet all of the goals of §3553(a)(2) in Mr. Bain's case. How does Mr. Bain's behavior in simply sitting in front of his computer in his basement warrant over **six thousand three hundred days** of imprisonment? The legality of the statutory minimum is not at issue. It is clearly the result of a proper function within the power of Congress. Where is there any justification demonstrated in the instant record, however, for hijacking that minimum to a sentence well over **three times** the minimum.

It was Congress that brought forth the Sentencing Commission and the Guidelines in the Sentencing Reform Act that barely passed as a rider to the Comprehensive Crime Control Act of 1983. *See* 98th Cong. 1st Sess., 1983, S. Rep. No. 225. The Commission and

its Guidelines immediately became targets of serious questions of constitutionality.

The Commission withstood its first constitutional showdown and prevailed in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647 (1989). In a sharp dissent, however, Justice Scalia charged the Commission had no constitutional authority for its power. It was not limited to implementing technical or procedural rules that are generally entrusted to agencies. It was operating virtually without oversight or control. The Commission was empowered to make substantive decisions and policy judgements "that the Constitution vested in the political branches," under Article I, Section 1. In claiming the power of this "new Branch" was unconstitutional, Justice Scalia described the Commission as "a sort of junior-varsity Congress." 488 U.S. at 414-15, 27 109 S.Ct. at 677, 683.

The Supreme Court began to reclaim the role of the Constitution, as well as the power and independence of the judiciary, in the *Apprendi* and *Blakely* decisions. In *Booker*, the power of the Commission broke. The Guidelines were declared to be unconstitutional, if applied to have a mandatory effect. On the same day it filed *Gall*, the Court also emphasized the independence of the Judiciary in *Kimbrough v. U.S.*, 552 U.S. 85, 128 S.Ct. 558 (2007). The Court addressed a sentencing judge's authority to vary from the Guidelines range based on the judge's disagreement with the Sentencing Commission policy rationale. The question was whether a judge could disagree with the Guidelines view that a quantity of crack

cocaine should be calculated at a ratio of 100:1 in comparison to provisions on powder cocaine. The Court concluded the advisory status of the Guidelines established in *Booker* certainly allowed a variance based on a disagreement the judge held with policy.

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the efforts of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency in the meantime to occasion ***dangerous innovation*** in the government, and serious oppressions of the minor party in the community.
>
> Alexander Hamilton, *The Federalist*, No. 78 (1788) (emphasis added).

In *Koon v. U.S.*, 518 U.S. 81, 100, 116 S.Ct. 2035 (1996), the Court said, "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The legal error Judge Jarvey made, and every court in the federal system continues to make, is in subconsciously presuming the Guidelines do not violate the separation of powers principles simply because they did not appear to do so back in 1989. History and experience since then has shown the Guidelines do violate the doctrine. This Court must revisit the rationale of *Mistretta*. The Court must conclude

that experience of the last 20 years has shown the integrity of the Judiciary has been severely damaged by the Guidelines. The Court must conclude it was an abuse of discretion for Judge Jarvey to employ the Guidelines.

As stated above, Justice Scalia's dissent in *Mistretta* expressed his opinion the Sentencing Commission was a separate branch of the federal government that was not authorized by the Constitution. Justice Blackmun, writing for the majority, disagreed and explained the Commission was actually an "independent" body that Congress had placed within the framework of the Judicial Branch. The anomaly was that Congress placed an agency that had legislative powers within the Judiciary. The majority focused on the issue of whether that placement had violated the constitutional requirement of the separation of powers:

> Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation. Setting to one side, for the moment, the question whether the composition of the Sentencing Commission violates the separation of powers, we observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches **or that undermine the integrity of the**

> **Judiciary**. 488 U.S. at 385, 109 S.Ct. at 661 (emphasis added).

Of course, there is no evil in the concept of innovation itself. As Hamilton warned, it is the "dangerous innovation in the government" that an independent Judiciary must keep in check. The dangerous innovation of the Guidelines has undermined the integrity of the Judiciary.

This case provides one more illustration of how the Guidelines do "undermine the integrity of the Judiciary." It was too early in the history of the Guidelines for the *Mistretta* court to see how the Guidelines would undermine the Judiciary. The history at *this* point, however, shows clearly how the Commission and the Guidelines have damaged the integrity of the Judiciary. The failure of *Booker, Rita* and *Gall* to save the integrity of the judiciary was described in a dissent by Judge Merritt in *U.S. v. Sedore*, 512 F. 3d 819 (6th Cir. 2008). The Honorable Gibert S. Merritt, Jr. has been sitting on the Sixth Circuit bench since 1977. In this dissent, he noted the Supreme Court's efforts to make the Guidelines only advisory in *Booker*, *Rita*, and *Gall* had failed to restore the integrity of the Judiciary:

> Except for those judges and lawyers who prefer to continue routine conformity to the old pre-*Blakely Booker* process of guideline sentencing, there is widespread disapproval of the present muddled system. This is because, in the main, the old system is just continuing on as though nothing had

> happened – continuing under the pretext that the guidelines are only "advisory" instead of being considered only as a starting point against the backdrop of the more sensible and humane penalogical goals set out in §3553(a), Title 18. This case is one more example of the continuing problem, the problem of guidelineism, or "guidelinitis," the inability of most federal courts to break their habit of mechanically relying just on the guidelines alone. 512 F. 3d at 828-29.

Last year, this Court indicated it is losing patience with the Guidelines system and losing patience with the Eighth Circuit's guidelinitis. In *U.S. v. Spears*, 533 F. 3d 715, 716-17 (8th Cir. 2008) (*en banc*), the circuit court stood *Kimbrough* on its head by concluding that the sentencing judge "may not categorically reject the ratio set forth by the Guidelines." In a summary reversal, this Court emphasized that *Kimbrough* quite clearly said a judge could categorically reject the 100:1 ratio. The *Kimbrough* decision allows the judge to reject the Guidelines policy and the ratio "based on *policy* disagreement with them." *Spears v. U.S.*, 129 S.Ct. 840 (2009) (emphasis supplied). The Court's waning patience with guidelinitis is shown here:

> The dissent says that "*Apprendi, Booker, Rita, Gall,* and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period." True enough – and we should therefore promptly remove from the menu the Eighth Circuit's offering, a

smuggled-in dish that is indigestible. *Spears*, at 845.

The back-door method by which the enhancements under 2G2.2(b) were slipped into the Guidelines was quickly and definitively exposed in the article authored by Skye Phillips, entitled *Protect Downward Departures: Congress and the Executive's Intrusion Into Judicial Independence*, 12 Journal of Law and Policy 947 (2004). At pages 976-94, Phillips documents in detail just how DOJ officials jumped on the political opportunity posed by the emotionally charged legislation connected to the AMBER Alert. A freshman congressman by the name of Tom Feeney proposed an amendment to the Protect Act, which was legislation the House was focusing on mainly as a means to establish the AMBER Alert system and reconcile various bills related to child kidnaping. Feeney later admitted he was simply a vehicle for two DOJ officials who planned to pass 2G2.2 through Congress without consulting or even notifying the Sentencing Commission. With only 20 minutes debate, the sentencing enhancements became law. The Feeney Amendment was opposed by the Sentencing Commission, the Chairman of the House Committee on the Judiciary, the Judicial Conference of the United States and the American Bar Association. By literally sneaking the amendment onto the floor of the House, the DOJ officials successfully circumvented all the powers that opposed it. *Phillips*, at 976-94.

The direct injection of the 2G2.2 enhancements under the Protect Act is the only time provisions of the Guidelines have been enacted without first being studied by the Sentencing Commission. *The History of the Child Pornography Guidelines*, United States Sentencing Commission. (2009), p. 38. This violates the process that *Mistretta* pointed out was necessary to a proper separation of powers. The DOJ's motivation in introducing the Feeney Amendment was a direct attempt to intimidate federal District Court judges who might consider departing downward to impose a sentence below a recommended Guideline range. The original proposal of the Amendment directed prosecutors to engage in a process that identifies to the Attorney General the name of any federal judge who departs downward on any type of sentence. In a Federal Judges Association Board of Directors meeting on May 5, 2003, Chief Justice Rehnquist observed that the Feeney Amendment "could appear to be an unwarranted and ill-considered effort to intimidate individual judges in the performance of their duties." *Phillips*, at 949, n. 13.

> The DOJ did not notify or consult with the Sentencing Commission in advance of the introduction of the Feeney Amendment in the House . . . The DOJ supported the original version of the Feeney Amendment because it "enacts long-overdue reforms to address the longstanding, and still-growing problem of downward departures from the Sentencing Commission's Federal Sentencing Guidelines. *Phillips,* at 986-87.

In other words, the 2G2.2 enhancements were a direct attack from the Executive Branch to invade the independence of a sentencing judge in performing his or her task of looking a particular defendant in the eye and weighing the proper 3553 factors to impose a sentence that is "sufficient, but not greater than necessary."

CONCLUSION

This Court can summarily remedy all the prejudice Mr. Bain has suffered by ruling the Eighth Circuit had no authority to review Petitioner's sentence for reasonableness when the sentencing was infected by significant procedural error. Failing that, the Court should rule the sentencing judge's unreasoned, automatic reliance on the sentencing enhancements was an abuse of discretion.

Respectfully submitted,

KENT A. SIMMONS

Attorney for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2981

United States of America, Appellee, v. Donald W. Bain, Jr., Appellant.	*	Appeal from the United States District Court for the Southern District of Iowa. [PUBLISHED]

Submitted: June 9, 2009
Filed: November 16, 2009

Before GRUENDER, BALDOCK,[1] and BENTON, Circuit Judges.

PER CURIAM.

Donald W. Bain, Jr., pled guilty to one count of receiving and distributing child pornography (Count 1), and one count of possession of child pornography (Count 2), 18 U.S.C. §§ 2252(a)(2), 2256. The district

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[1] The Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit Court of Appeals, sitting by designation.

court[2] sentenced him to 210 months imprisonment on Count 1, and 120 months on Count 2, to be served concurrently. Bain appeals the sentence. Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b)(1), this court affirms.

I.

On February 9, 2005, the FBI, acting on a tip from the Norwegian government, executed a search warrant at Bain's house. Agents seized three computers and numerous floppy disks containing 496 images and digital movies depicting minors engaged in sexual acts. Bain admitted to the FBI that he traded child pornography files from his home, using the file sharing program "Kazaa."

After being indicted, Bain was placed on pre-trial release, with supervision and an unsecured appearance bond. He was allowed to travel outside the country several times, with permission of the court. He underwent two psychological examinations, each concluding that he did not meet the criteria for a diagnosis of pedophilia, and that he presented low risk of re-offense.

The PSR determined the base offense level as 22. This was increased two levels because some material involved minors under age 12, U.S.S.G. § 2G2.2(b)(2);

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[2] The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

five levels because he traded the material for more child pornography, U.S.S.G. § 2G2.2(b)(3)(B); four levels because some material portrayed sadism, masochism, or other depictions of violence, U.S.S.G. § 2G2.2(b)(4); two levels because he used a computer to receive and distribute material, U.S.S.G. § 2G2.2(b)(6); and five levels because the offense involved more than 600 images,[3] U.S.S.G. § 2G2.2(b)(7)(D). After a three-level decrease for acceptance of responsibility, Bain's total offense level was 37. With a criminal history category I, this translates to a guidelines range of 210 to 262 months.

At sentencing, Bain requested the statutory minimum sentence of 60 months, arguing the § 3553(a) factors. The district court responded:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the Guidelines? People who cooperate and put their life at risk, if the Court gives them more than 45 or 50 percent off for putting their life at risk, the Court of Appeals

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[3] Although only 496 "images" were found, at least eight were video clips, which are assigned a value of 75 images each. *See* U.S.S.G. § 2G2.2 cmt. 4.

> reverses that as an unreasonable sentence. Here what would the grounds be for a variance of the magnitude you are talking about?

Bain told the court that "a grounds for variance that make it acceptable in the Guidelines does not exist." He went on to explain that his character, history, and the fact that he would not re-offend are reasons "that a long sentence is not necessary." The court did not respond.

After the government asked for the low end of the guidelines range, the court stated:

> You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have – you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

The court then considered the § 3553 factors, concluding that "a sentence at the bottom of the range is sufficient to address the essential sentencing considerations."

II.

Reviewing a sentence, this court must "first ensure that the district court committed no significant

procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall v. United States,* 552 U.S. 38, 51 (2007). "If the decision was 'procedurally sound,' we then review the 'substantive reasonableness of the sentence' under the abuse-of-discretion standard considering the totality of the circumstances." *United States v. Alvizo-Trujillo,* 521 F.3d 1015, 1017 (8th Cir. 2008), *citing Gall,* 552 U.S. at 51.

A.

Bain argues that the district court procedurally erred by applying a presumption of reasonableness to the guidelines range in violation of *Rita v. United States,* 551 U.S. 338 (2007), and by requiring extraordinary circumstances to justify a non-guidelines sentence in violation of *Gall,* 552 U.S. 38.

The district court twice referenced a presumption of reasonableness. First, after Bain asked for the statutory minimum sentence the court replied, "In order to go below the Guidelines pursuant to 3553 *which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable,* there's got to be a ground for

a variance." (emphasis added). Second, when announcing the sentence the court stated:

> *The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals.* They are not mandatory, but they are based on extensive study and refinement. They exhibit the will of Congress and they promote consistency in sentencings. Accordingly the court looks to those Guidelines as an important though not singularly controlling factor to be considered.

(emphasis added).

Bain's sentencing occurred one month after the Supreme Court decided *Rita*. *See Rita*, 551 U.S. 338 (decided June 21, 2007). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002). Thus, the district court here meant that the presumption of reasonableness is only an appellate presumption when stating that the guidelines are presumed reasonable "in the Eighth Circuit now as affirmed by the United States Supreme Court." *See United States v. Gray*, 533 F.3d 942, 943 (8th Cir. 2008) (noting *Rita* was "hardly [an] obscure decision[ ] likely to have been overlooked by federal sentencing judges. . . ."). The district court here did not commit *Rita* error. *Cf. United States v. Burnette*, 518 F.3d 942, 946-47 (8th Cir. 2008) (district court's statement before *Rita* that a "sentence within

the guidelines is presumed reasonable" was plain error after *Rita*).

After this court's original opinion was filed in August 2008, the Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Nelson v. United States*, 129 S. Ct. 890 (2009). In that case, the district court stated that under Fourth Circuit precedent, "the Guidelines are considered presumptively reasonable," so that "unless there's a good reason in the [statutory sentencing] factors . . . , the Guideline sentence is the reasonable sentence." *Nelson*, 129 S. Ct. at 891. The Supreme Court emphasized that "the Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable," and found "it plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson's Guidelines range." *Id.* at 892.

Unlike *Nelson*, the sentencing judge's statements here do not indicate that he presumed the Guidelines range reasonable. The district court's statements about the presumption of reasonableness refer to "the Eighth Circuit" and "the Eighth Circuit Court of Appeals." These statements merely recognize that a sentence within the Guidelines range is presumed reasonable at the appellate level. The district court here did not go on to say that the Guideline sentence "is the reasonable sentence" absent good reason in the statutory sentencing factors; rather, the district court here understood the Guidelines as "an important though not singularly controlling factor to be

considered." Critically, sentencing here occurred one month *after Rita*, while sentencing in the *Nelson* case occurred fourteen months *before Rita*. Thus, in light of the presumption that a district judge knows and applies the law, the district court here did not apply a presumption of reasonableness to the Guidelines range.

Even so, the district court committed *Gall* error by requiring extraordinary circumstances to justify the requested non-guidelines sentence. Before *Gall*, this circuit "discourage[d] drastic reductions [in sentences] absent extraordinary circumstances, especially when the sentencing guidelines already significantly reflect the mitigating factors." *United States v. Gonzalez-Alvarado*, 477 F.3d 648, 651 (8th Cir. 2007). Bain's sentencing occurred four months before *Gall* "reject[ed] [ ] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Gall*, 552 U.S. at 47. The Court also "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.*

Taking the district court's comments in light of the circuit law at the time, the court undoubtedly believed that extraordinary circumstances were required to justify Bain's requested sentence. When he asked for the statutory minimum, the district court said "I can't do that," noting that when district courts give reductions of "more than 45 or 50 percent off [the guideline range] for [defendants] putting their life at

risk, the Court of Appeals reverses. . . ." The fact that the district court twice mentioned the appellate presumption of reasonableness reinforces that it felt constrained by this circuit's (then) strict percentage review, and did not independently consider Bain's arguments that a 60-month sentence was sufficient but not greater than necessary to meet the sentencing goals of § 3553. *See Gall*, 552 U.S. at 47, 50 (district court "must make an individualized assessment based on the facts presented"); *Burnette*, 518 F.3d at 946-47 (district court's statement that the Court of Appeals is very tough on variances and "sentences below the guidelines range to amount to anything are not easily accomplished" was error after *Rita* and *Gall*). The district court erred here. By requiring extraordinary circumstances, it misapprehended its authority to issue a non-guidelines sentence. *See United States v. Tabor*, 531 F.3d 688, 692 (8th Cir. 2008) ("[S]ignificant procedural error occurs if the district court fails to understand the scope of its authority and discretion at sentencing.").

B.

If not preserved, procedural sentencing errors are reviewed only for plain error. *See Burnette*, 518 F.3d at 946. Bain asserts he preserved error by "informing

the judge of the course of action he wished the judge to take, and by stating the exact sentence sought."[4]

This circuit requires more than a request for a non-guidelines sentence in order to preserve *Rita* or *Gall* error; the defendant must object to the district court's erroneous application of the law. *See United States v. Gaddy*, 532 F.3d 783, 790 (8th Cir. 2008) (applying plain error review to *Rita* error because the defendant "did not object to the district court's alleged presumption"); *Alvizo-Trujillo*, 521 F.3d at 1018 (request for variance and statement that guidelines range was unreasonably high did not preserve alleged error because it "was merely commentary and was made before the district court announced the improper presumption and the sentence"); *United States v. Vaughn*, 519 F.3d 802, 805 (8th Cir. 2008) (applying plain error review to *Rita* error where defendant asked for variance, because the defendant did not object in the district court); *Burnette*, 518 F.3d at 946 (applying plain error review to *Rita* and *Gall* error because "[a]fter withdrawing his objections to the

[4] The government argued that review is for abuse of discretion. A party's concession on the standard of review does not bind the court, as "[s]uch a determination remains for this court to make for itself." *K & T Enter., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996). *See also Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001) (courts, not the parties, determine the standard of review; it cannot be waived), *citing Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1022 n.4 (9th Cir. 1997) (en banc) (O'Scannlain, J., concurring in part and dissenting in part); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1519 n.24 (5th Cir. 1994) (the standard of review cannot be waived).

PSR, [the defendant] made no further objections to his sentence"); *United States v. Marston*, 517 F.3d 996, 1004 (8th Cir. 2008) (applying plain error review to *Rita* error because the defendant "did not object at sentencing that the district court's interpretation of the law was incorrect"). Because Bain did not object to the district court's requirement of extraordinary circumstances to justify the requested sentence, this court may only review for plain error.[5]

"Under plain error review, the defendant must show: (1) an error; (2) that is plain; and (3) that

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[5] Bain cites Rule 51 to support his argument that he preserved the error here by requesting an "exact" non-guidelines sentence. *See* Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error *by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take*, or the party's objection to the court's action and the grounds for that objection.") (emphasis added).

Although requesting a non-guidelines sentence does not preserve *Rita* or *Gall* error, this court has held that requesting a variance based on the crack/powder-cocaine disparity is sufficient to preserve *Kimbrough* error. *See Tabor*, 531 F.3d at 692 (applying de novo review to *Kimbrough* error where defendant requested variance); *United States v. Cawthorn*, 527 F.3d 678, 679-80 (8th Cir. 2008) (same); *United States v. Thomas*, 524 F.3d 855, 860 (8th Cir. 2008) (same); *United States v. Lee*, 521 F.3d 911, 913-14 (8th Cir. 2008) (same); *United States v. Roberson*, 517 F.3d 990, 995 (8th Cir. 2008) (same). *See generally United States v. Langford*, 516 F.3d 205, 222 (3rd Cir. 2008) ("In *Rita*, *Gall*, and *Kimbrough*, the Court sought to remedy the errors of many courts that 'continued to treat the Guidelines as virtually mandatory,' by reemphasizing their advisory nature as well as the broad discretion granted sentencing courts under § 3553(a)."), *quoting Rita*, 551 U.S. at 366 (Stevens, J., concurring).

affects substantial rights." *Vaughn,* 519 F.3d at 804, *citing Johnson v. United States,* 520 U.S. 461, 466-67 (1997). A plain error will not be corrected unless (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano,* 507 U.S. 725, 732 (1993).

The *Gall* error here is plain. *See Burnette,* 518 F.3d at 947, *citing Johnson,* 520 U.S. at 468 (it is enough that an error be plain at the time of appeal). The issue is whether the error affected a substantial right.

An error affects a substantial right if it is prejudicial. *Olano,* 507 U.S. at 734. A sentencing error is prejudicial if there is a reasonable probability the defendant would have received a lighter sentence but for the error. *United States v. Pirani,* 406 F.3d 543, 552 (8th Cir. 2005) (en banc). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez,* 542 U.S. 74, 83 n.9 (2004). In light of the entire record, the reviewing court must be satisfied that "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 83, *quoting Strickland v. Washington,* 466 U.S. 668, 694 (1984).

Bain was sentenced to the low end of the guidelines range. This alone is insufficient to establish a reasonable probability that he would have received a

lower sentence. *Pirani*, 406 F.3d at 553. The district court stated that

> [Y]ou're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

It is unclear whether the district court meant the sentence was harsh, or whether the district court meant it was unfortunate that an otherwise well-functioning member of society had committed this crime. The district court proceeded to consider the § 3553(a) factors, concluding that "[b]ased on all the circumstances of this case . . . a sentence at the bottom of the range is sufficient to address the essential sentencing considerations." On this record, it is not clear what action the district court would have taken absent the *Gall* error. "[W]here the effect of the error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." *Pirani*, 406 F.3d at 553. Therefore, this court finds that Bain has not met his burden of showing a reasonable probability of a lower sentence. *See Gaddy*, 532 F.3d at 791 (no prejudice where district court stated the guidelines range was pretty stern, but "extensively discussed the § 3553(a) factors").

C.

Bain also asserts that his sentence is substantively unreasonable. No objection is needed to preserve an attack on the substantive reasonableness of a sentence. *United States v. Wiley*, 509 F.3d 474, 476-77 (8th Cir. 2007). This court considers "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51.

Bain argues that this court should not apply a presumption of reasonableness to his within-guidelines sentence because of the district court's *Gall* error. "[T]he presumption [of reasonableness] reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." *Rita*, 551 U.S. at 347 (emphasis in original). When there is *Gall* error, the district court feels constrained by the guidelines, and therefore does not *independently* reach the same conclusion as to the proper sentence. If the district court and the Sentencing Commission did not independently come to the same conclusion, the rationale for the presumption disappears.

This court will therefore determine whether the 210 month sentence is substantively reasonable with

regard to the § 3553(a) factors, without the presumption of reasonableness. The factors to be considered under § 3553(a) are:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
>
> (5) any pertinent policy statement issued by the Sentencing Commission;

> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Before sentencing Bain, the district court stated:

> I have considered the nature and circumstances of this offense and the history and characteristics of this defendant. I have considered the seriousness of the offense and note in that regard that the number of images involved here and the amount of trading of files puts this case above the garden variety, the offense in its most basic form.
>
> The Court has also considered the question of just punishment. The Court looked at the Presentence Report very hard to see any evidence of pedoph[i]lia or anything like that that would exacerbate this situation, aggravate the sentence.
>
> I have considered the issue of adequate deterrence to criminal conduct as I must and to the extent that a sentence of imprisonment can do such a thing in these cases, it will certainly have that effect.
>
> I have considered the need to protect the public from further crimes and rely heavily

in that regard on the psychosexual investigation that was conducted in this case and which indicated that the – that Mr. Bain has a low risk for other problems and a high likelihood for successful rehabilitation.

I have considered the sentencing options that are available. I have also, of course, considered the kind of sentences and the advisory sentencing range established by the Guidelines. The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals. They are not mandatory, but they are based on extensive study and refinement. They exhibit the will of Congress and they promote consistency in sentencing. Accordingly the Court looks to those Guidelines as an important though not singularly controlling factor to be considered.

The Court has also examined the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. We have had quite a number of people that are very similarly situated to Mr. Bain, successful, hard working, family people that get caught up in this and so we have a track record here in Federal Court and all across the Southern District of Iowa and it is, of course, important pursuant to the Guidelines and pursuant to Section 3553 to promote consistency among those sentences.

I conclude that the Guideline system adequately addresses the circumstances of this

> defendant and the Sentencing Guideline range is reasonable.

Given the court's detailed consideration of the § 3553(a) factors, and the "deferential abuse-of-discretion standard of review that applies to all sentencing decisions," *Gall*, 552 U.S. at 52, this court cannot say that a 210 month sentence is "outside the range of choice dictated by the facts of the case." *United States v. Jones*, 507 F.3d 657, 659 (8th Cir. 2007) (defining abuse of discretion in sentencing). *See Burnette*, 518 F.3d at 949 (finding guidelines sentence substantively reasonable despite *Rita* and *Gall* error); *Vaughn*, 519 F.3d at 805-06 (finding guidelines sentence substantively reasonable despite *Rita* error).

III.

The judgment of the district court is affirmed.

BENTON, Circuit Judge, concurring.

I concur due to this circuit's precedent requiring plain error review of unpreserved procedural errors. I write separately because, on these facts, *Gall v. United States*, 552 U.S. 38 (2007), requires remand.

Before *Booker*, the Supreme Court interpreted 18 U.S.C. § 3742(f)(1) as requiring harmless error analysis of misapplication of the guidelines – which is a procedural error post *Gall*. *See* ***Williams v. United States***, 503 U.S. 193, 203 (1992). *Williams* addressed

a district court's upward departure based on both prohibited and authorized grounds. ***Id.*** at 196. After finding the error harmless under § 3742(f)(1), the Court reviewed the decision to depart for "reasonableness" under § 3742(f)(2), a review like post-*Gall* substantive review. *See* ***id.*** at 203-04 (reasonableness review involves the appellate court "examin[ing] the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence."). The Court stated that a "sentence thus can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive guidelines range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure." ***Id.***

This court has determined that "nothing in *Gall* [] undermines *Williams* or makes harmless-error analysis inapplicable to procedural sentencing errors." ***United States v. Henson,*** 550 F.3d 739, 740-41 (8th Cir. 2008) (noting that § 3742(f) was left intact by *Booker*). *See also* ***United States v. Vickers,*** 528 F.3d 1116, 1121 (8th Cir. 2008) (applying harmless error post-*Gall*); ***United States v. Greene,*** 513 F.3d 904, 908 (8th Cir. 2008) (same); ***United States v. Huff,*** 514 F.3d 818, 821 (8th Cir. 2008) (same).

Before *Gall*, this court ruled that plain error review applies to unpreserved *Booker* errors. *See* ***United States v. Pirani,*** 406 F.3d 543, 548-49 (8th Cir. 2005) (en banc). *Booker* required sentences to be reviewed only for "unreasonableness." ***United States***

v. Booker, 543 U.S. 220, 260-61 (2005). "*Gall v. United States* calls for an appellate court to conduct two layers of review, first for procedural soundness, then for substantive reasonableness." ***Vickers,*** 528 F.3d at 1122 (Shepherd, J., concurring) (citation omitted). Post-*Gall,* this court continues to apply plain-error review to unpreserved procedural errors. *See, e.g.,* ***United States v. Alvizo-Trujillo,*** 521 F.3d 1015, 1018 (8th Cir. 2008) (applying plain error post-*Gall*); ***United States v. Burnette,*** 518 F.3d 942, 946 (8th Cir. 2008) (same).

This case illustrates the difficulty of conducting substantive review, after a finding of *Gall* error. The majority finds a *Gall* error here, but does not reverse under plain error review because the record does not indicate that the district court would have given a lower sentence had it been aware of its full authority to sentence outside the guidelines. The majority must then proceed to review the substantive reasonableness of the sentence, based on the district court's explanation of the § 3553(a) factors. *See* ***Gall,*** 552 U.S. at 51 ("[T]he appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."). Unlike *Williams* where the appellate court could determine whether the authorized grounds alone justified the departure, here the court has no basis to judge whether the sentence is reasonable.

When Bain requested the 60-month sentence, the district court stated, "I can't do that,. . . . if the Court gives [defendants] more than 45 or 50 percent off for

putting their life at risk, the Court of Appeals reverses that as an unreasonable sentence." The district court did not seriously consider Bain's arguments for a 60-month sentence; therefore the entire § 3553(a) explanation is tainted by the *Gall* error. *See* ***Vickers,*** 528 F.3d at 1122-23 (Shepherd, J., concurring) (procedural error "thwarts reasonableness review – that is, it cuts off our review process before we even reach the issue of reasonableness"); ***United States v. Langford,*** 516 F.3d 205, 213 (3rd Cir. 2008) ("Our reasonableness review relies on a district court's reasoning from the starting point of the correctly calculated Guidelines through the § 3553(a) factors."). The record here does not indicate what sentence the district court believed was "sufficient but not greater than necessary." Due to the deferential abuse of discretion standard, the majority affirms the sentence based on explanations that may not reflect the district court's unrestrained opinion.

District courts must "make an *individualized* assessment" of the correct sentence, and "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." ***Gall,*** 552 U.S. at 50 (emphasis added). Substantive review under *Gall* requires this court to defer to the district court's *unrestrained* opinion about what sentence is "sufficient but not greater than necessary," and the reasons therefor. *See also* ***Rita v. United States,*** 551 U.S. 338, 357 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties'

arguments and has a reasoned basis for exercising *his own legal decisionmaking authority*.") (emphasis added).

Since this court has no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*. *See* ***United States v. Pepper,*** 518 F.3d 949, 953 (8th Cir. 2008) (reversing and remanding for resentencing – without harmless error, plain error, or substantive review – where the district court "procedurally erred by failing to explain adequately [defendant's] sentence and by relying predominantly on improper factors to determine the sentence variance"); ***United States v. Kemp,*** 530 F.3d 719, 723 (8th Cir. 2008) (reversing and remanding because "we are not sure that the district court adopted the guidelines range recommended in the PSR"); ***United States v. Garcia-Hernandez,*** 530 F.3d 657, 665-666 (8th Cir. 2008) (reversing procedural error of "relying on an erroneous factor" without harmless error, plain error, or substantive reasonableness analysis). *Cf.* ***United States v. Thomas,*** 524 F.3d 855, 860 (8th Cir. 2008) (reversing and remanding *Kimbrough* error because it was unclear whether it would have varied from the guidelines range had it know [sic] it had the authority); ***United States v. Roberson,*** 517 F.3d 990, 995 (8th Cir. 2008) (reversing and remanding *Kimbrough* error because "[w]hen a district court does not consider an argument because it is unaware of its power to do so, [ ] remand is appropriate.").

Because this circuit's precedent requiring plain error review of unpreserved *Gall* error does not allow a remand, I concur in the result.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2981

United States of America, Appellee, v. Donald W. Bain, Jr., Appellant.	]]]]]]]	Appeal from the United States District Court for the Southern District of Iowa. [PUBLISHED]

Submitted: April 15, 2008
Filed: August 8, 2008

Before GRUENDER, BALDOCK,[1] and BENTON, Circuit Judges.

PER CURIAM.

Donald W. Bain, Jr., pled guilty to one count of receiving and distributing child pornography (Count 1), and one count of possession of child pornography (Count 2), 18 U.S.C. §§ 2252(a)(2), 2256. The district

[1] The Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit Court of Appeals, sitting by designation.

court[2] sentenced him to 210 months imprisonment on Count 1, and 120 months on Count 2, to be served concurrently. Bain appeals the sentence. Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b)(1), this court affirms.

I.

On February 9, 2005, the FBI, acting on a tip from the Norwegian government, executed a search warrant at Bain's house. Agents seized three computers and numerous floppy disks containing 496 images and digital movies depicting minors engaged in sexual acts. Bain admitted to the FBI that he traded child pornography files from his home, using the file sharing program "Kazaa."

After being indicted, Bain was placed on pre-trial release, with supervision and an unsecured appearance bond. He was allowed to travel outside the country several times, with permission of the court. He underwent two psychological examinations, each concluding that he did not meet the criteria for a diagnosis of pedophilia, and that he presented low risk of re-offense.

The PSR determined the base offense level as 22. This was increased two levels because some material involved minors under age 12, U.S.S.G. § 2G2.2(b)(2);

[2] The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

five levels because he traded the material for more child pornography, U.S.S.G. § 2G2.2(b)(3)(B); four levels because some material portrayed sadism, masochism, or other depictions of violence, U.S.S.G. § 2G2.2(b)(4); two levels because he used a computer to receive and distribute material, U.S.S.G. § 2G2.2(b)(6); and five levels because the offense involved more than 600 images,[3] U.S.S.G. § 2G2.2(b)(7)(D). After a three-level decrease for acceptance of responsibility, Bain's total offense level was 37. With a criminal history category I, this translates to a guidelines range of 210 to 262 months.

At sentencing, Bain requested the statutory minimum sentence of 60 months, arguing the § 3553(a) factors. The district court responded:

> I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a variance of as much as two-thirds to three-fourths of the sentence under the Guidelines? People who cooperate and put their life at risk, if the Court gives them more than 45 or 50 percent off for putting their life at risk, the Court of Appeals

[3] Although only 496 "images" were found, at least eight were video clips, which are assigned a value of 75 images each. *See* U.S.S.G. § 2G2.2 cmt. 4.

> reverses that as an unreasonable sentence. Here what would the grounds be for a variance of the magnitude you are talking about?

Bain told the court that "a grounds for variance that make it acceptable in the Guidelines does not exist." He went on to explain that his character, history, and the fact that he would not re-offend are reasons "that a long sentence is not necessary." The court did not respond.

After the government asked for the low end of the guidelines range, the court stated:

> You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have – you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

The court then considered the § 3553 factors, concluding that "a sentence at the bottom of the range is sufficient to address the essential sentencing considerations."

II.

Reviewing a sentence, this court must "first ensure that the district court committed no significant

procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 128 S. Ct. 586, 597 (2007). "If the decision was 'procedurally sound,' we then review the 'substantive reasonableness of the sentence' under the abuse-of-discretion standard considering the totality of the circumstances." *United States v. Alvizo-Trujillo*, 521 F.3d 1015, 1017 (8th Cir. 2008), *citing Gall*, 128 S. Ct. at 597.

A.

Bain argues that the district court procedurally erred by applying a presumption of reasonableness to the guidelines range in violation of *Rita v. United States*, 127 S. Ct. 2456 (2007), and by requiring extraordinary circumstances to justify a non-guidelines sentence in violation of *Gall*, 128 S. Ct. 586.

The district court twice referenced a presumption of reasonableness. First, after Bain asked for the statutory minimum sentence the court replied, "In order to go below the Guidelines pursuant to 3553 *which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable*, there's got to be a ground for a variance." (emphasis added). Second, when announcing

the sentence the court stated, "*The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals.* They are not mandatory, but they are based on extensive study and refinement." (emphasis added).

Bain's sentencing occurred one month after the Supreme Court decided *Rita*. *See Rita*, 127 S. Ct. 2456 (decided June 21, 2007). "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002). Presumably, the district court realized that the presumption of reasonableness is only an appellate presumption, and this was its meaning when it stated that the guidelines are presumed reasonable in the Eighth Circuit, as affirmed by the Supreme Court. *See United States v. Gray*, ___ F.3d ___, ___, No. 07-2099, slip op. at 2 (8th Cir. July 18, 2008) (noting *Rita* was "hardly [an] obscure decision[ ] likely to have been overlooked by federal sentencing judges. . . ."). The district court here did not commit *Rita* error. *Cf. United States v. Burnette*, 518 F.3d 942, 946-47 (8th Cir. 2008) (district court's statement before *Rita* that a "sentence within the guidelines is presumed reasonable" was plain error after *Rita*), *petition for cert. filed*, No. 07-11317 (June 4, 2008).

Although the district court did not apply a presumption of reasonableness to the guidelines range, it committed *Gall* error by requiring extraordinary

circumstances to justify the requested non-guidelines sentence.

Before *Gall*, this circuit "discourage[d] drastic reductions [in sentences] absent extraordinary circumstances, especially when the sentencing guidelines already significantly reflect the mitigating factors." *United States v. Gonzalez-Alvarado*, 477 F.3d 648, 651 (8th Cir. 2007). Bain's sentencing occurred four months before *Gall* "reject[ed] [] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." *Gall*, 128 S. Ct. at 595. The Court also "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.*

Taking the district court's comments in light of the circuit law at the time, the court undoubtedly believed that extraordinary circumstances were required to justify Bain's requested sentence. When he asked for the statutory minimum, the district court said "I can't do that," noting that when district courts give reductions of "more than 45 or 50 percent off [the guideline range] for [defendants] putting their life at risk, the Court of Appeals reverses. . . ." The fact that the district court twice mentioned the appellate presumption of reasonableness reinforces that it felt constrained by this circuit's (then) strict percentage review, and did not independently consider Bain's arguments that a 60-month sentence was sufficient but not greater than necessary to meet the sentencing

goals of § 3553. *See Gall,* 128 S. Ct. at 595, 597 (district court "must make an individualized assessment based on the facts presented"); *Burnette,* 518 F.3d at 946-47 (district court's statement that the Court of Appeals is very tough on variances and "sentences below the guidelines range to amount to anything are not easily accomplished" was error after *Rita* and *Gall*). The district court erred here. By requiring extraordinary circumstances, it misapprehended its authority to issue a non-guidelines sentence. *See United States v. Tabor,* ___ F.3d ___, ___ No. 05-2169, slip op. at 6 (8th Cir. July 10, 2008) ("[S]ignificant procedural error occurs if the district court fails to understand the scope of its authority and discretion at sentencing.").

B.

If not preserved, procedural sentencing errors are reviewed only for plain error. *See Burnette,* 518 F.3d at 946. Bain asserts he preserved error by "informing the judge of the course of action he wished the judge to take, and by stating the exact sentence sought."[4]

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[4] The government argued that review is for abuse of discretion. A party's concession on the standard of review does not bind the court, as "[s]uch a determination remains for this court to make for itself." *K & T Enter., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996). *See also Worth v. Tyer,* 276 F.3d 249, 262 n.4 (7th Cir. 2001) (courts, not the parties, determine the standard of review; it cannot be waived), *citing Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1022 n.4 (9th Cir. 1997) (en banc) (O'Scannlain,

(Continued on following page)

This circuit requires more than a request for a non-guidelines sentence in order to preserve *Rita* or *Gall* error; the defendant must object to the district court's erroneous application of the law. *See United States v. Gaddy*, ___ F.3d ___, ___, 07-2625, slip op. at 11 (8th Cir. July 14, 2008) (applying plain error review to *Rita* error because the defendant "did not object to the district court's alleged presumption"); *Alvizo-Trujillo*, 521 F.3d at 1018 (request for variance and statement that guidelines range was unreasonably high did not preserve alleged error because it "was merely commentary and was made before the district court announced the improper presumption and the sentence"); *United States v. Vaughn*, 519 F.3d 802, 805 (8th Cir. 2008) (applying plain error review to *Rita* error where defendant asked for variance, because the defendant did not object in the district court); *Burnette*, 518 F.3d at 946 (applying plain error review to *Rita* and *Gall* error because "[a]fter withdrawing his objections to the PSR, [the defendant] made no further objections to his sentence"); *United States v. Marston*, 517 F.3d 996, 1004 (8th Cir. 2008) (applying plain error review to *Rita* error because the defendant "did not object at sentencing that the district court's interpretation of the law was incorrect"). Because Bain did not object to the district court's requirement of extraordinary circumstances to

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J., concurring in part and dissenting in part), *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1519 n.24 (5th Cir. 1994) (the standard of review cannot be waived).

justify the requested sentence, this court may only review for plain error.[5]

"Under plan error review, the defendant must show: (1) an error; (2) that is plain; and (3) that affects substantial rights." *Vaughn*, 519 F.3d at 804, *citing Johnson v. United States*, 520 U.S. 461, 466-67 (1997). A plain error will not be corrected unless (4) it seriously affects the fairness, integrity, or public

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[5] Rain cites Rule 51 to support his argument that he preserved the error here by requesting an "exact" non-guidelines sentence. *See* Fed. R. Crim. Po. 51(b) ("A party may preserve a claim of error *by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take*, or the party's objection to the court's action and the grounds for that objection.") (emphasis added).

Although requesting a non-guidelines sentence does not preserve *Rita* or *Gall* error, this court has held that requesting a variance based on the crack/powder-cocaine disparity is sufficient to preserve *Kimbrough* error. *See Tabor*, ___ F.3d at ___, No. 05-2169, slip op. at 6 (applying de novo review to *Kimbrough* error where defendant requested variance); *United States v. Cawthorn*, 527 F.3d 678, 679-80 (8th Cir. 2008) (same); *United States v. Thomas*, 524 F.3d 855, 860 (8th Cir. 2006) (same); *United States v. Lee*, 521 F.3d 911, 913-14 (8th Cir. 2008) (same); *United States v. Moore*, 518 F.3d 577, 580 (8th Cir. 2008) (same); *United States v. Roberson*, 517 F.3d 990, 995 (8th Cir. 2008) (same). *See generally United States v. Langford*, 516 F.3d 205, 222 (3rd Cir. 2008) ("In *Rita*, *Gall*, and *Kimbrough*, the Court sought to remedy the errors of many courts that 'continued to treat the Guidelines as virtually mandatory,' by reemphasizing their advisory nature as well as the broad discretion granted sentencing courts under § 3553(a)."), *quoting Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring).

reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993).

The *Gall* error here is plain. *See Burnette*, 518 F.3d at 947, *citing Johnson*, 520 U.S. at 468 (it is enough that an error be plain at the time of appeal). The issue is whether the error affected a substantial right.

An error affects a substantial right if it is prejudicial. *Olano*, 507 U.S. at 734. A sentencing error is prejudicial if there is a reasonable probability the defendant would have received a lighter sentence but for the error. *United States v. Pirani*, 406 F.3d 543, 552 (8th Cir. 2005) (en banc). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). In light of the entire record, the reviewing court must be satisfied that "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 83, *quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Bain was sentenced to the low end of the guidelines range. This alone is insufficient to establish a reasonable probability that he would have received a lower sentence. *Pirani*, 406 F.3d at 553. The district court stated that

> [Y]ou're going to pay dearly, your wife is going to pay dearly, everybody associated

> with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

It is unclear whether the district court meant the sentence was harsh, or whether the district court meant it was unfortunate that an otherwise well-functioning member of society had committed this crime. The district court proceeded to consider the § 3553(a) factors, concluding that "[b]ased on all the circumstances of this case . . . a sentence at the bottom of the range is sufficient to address the essential sentencing considerations." On this record, it is not clear what action the district court would have taken absent the *Gall* error. "[W]here the effect of the error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." *Pirani*, 406 F.3d at 553. Therefore, this court finds that Bain has not met his burden of showing a reasonable probability of a lower sentence. *See Gaddy*, ___ F.3d at ___, No. 07-2625, slip op. at 11 (no prejudice where district court stated the guidelines range was pretty stern, but "extensively discussed the § 3553(a) factors").

C.

Bain also asserts that his sentence is substantively unreasonable. No objection is needed to

preserve an attack on the substantive reasonableness of a sentence. *United States v. Wiley*, 509 F.3d 474, 476-77 (8th Cir. 2007). This court considers "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 128 S. Ct. at 597.

Bain argues that this court should not apply a presumption of reasonableness to his within-guidelines sentence because of the district court's *Gall* error. "[T]he presumption [of reasonableness] reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one." *Rita*, 127 S. Ct. at 2463 (emphasis in original). When there is *Gall* error, the district court feels constrained by the guidelines, and therefore does not *independently* reach the same conclusion as to the proper sentence. If the district court and the Sentencing Commission did not independently come to the same conclusion, the rationale for the presumption disappears.

This court will therefore determine whether the 210 month sentence is substantively reasonable with regard to the § 3553(a) factors, without the presumption of reasonableness. The factors to be considered under § 3553(a) are:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;

(5) any pertinent policy statement issued by the Sentencing Commission;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Before sentencing Bain, the district court stated:

> I have considered the nature and circumstances of this offense and the history and characteristics of this defendant. I have considered the seriousness of the offense and note in that regard that the number of images involved here and the amount of trading of files puts this case above the garden variety, the offense in its most basic form.
>
> The Court has also considered the question of just punishment. The Court looked at the Presentence Report very hard to see any evidence of pedophelia or anything like that that would exacerbate this situation, aggravate the sentence.
>
> I have considered the issue of adequate deterrence to criminal conduct as I must and to the extent that a sentence of imprisonment can do such a thing in these cases, it will certainly have that effect.
>
> I have considered the need to protect the public from further crimes and rely heavily in that regard on the psychosexual investigation that was conducted in this case and which indicated that the – that Mr. Bain has a low risk for other problems and a high likelihood for successful rehabilitation.

> I have considered the sentencing options that are available. I have also, of course, considered the kind of sentences and the advisory sentencing range established by the Guidelines. The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals. They are not mandatory, but they are based on extensive study and refinement. They exhibit the will of Congress and they promote consistency in sentencing. Accordingly the Court looks to those Guidelines as an important though not singularly controlling factor to be considered.
>
> The Court has also examined the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. We have had quite a number of people that are very similarly situated to Mr. Bain, successful, hard working, family people that get caught up in this and so we have a track record here in Federal Court and all across the Southern District of Iowa and it is, of course, important pursuant to the Guidelines and pursuant to Section 3553 to promote consistency among those sentences.
>
> I conclude that the Guideline system adequately addresses the circumstances of this defendant and the Sentencing Guideline range is reasonable.

Given the court's detailed consideration of the § 3553(a) factors, and the "deferential abuse-of-discretion standard of review that applies to all sentencing decisions,"

Gall, 128 S. Ct. at 598, this court cannot say that a 210 month sentence is "outside the range of choice dictated by the facts of the case." *United States v. Jones*, 507 F.3d 657, 659 (8th Cir. 2007) (defining abuse of discretion in sentencing). *See Burnette*, 518 F.3d at 949 (finding guidelines sentence substantively reasonable despite *Rita* and *Gall* error); *Moore*, 518 F.3d at 580 (due to deferential standard of review and district court's careful explanation of § 3553(a) factors, high end of the guidelines sentence substantively reasonable with or without a presumption of reasonableness); *Vaughn*, 519 F.3d at 805-06 (finding guidelines sentence substantively reasonable despite *Rita* error).

III.

The judgment of the district court is affirmed.

BENTON, Circuit Judge, concurring.

I concur due to this circuit's precedent requiring plain error review of unpreserved procedural errors. I write separately because, on these facts, *Gall v. United States*, 128 S. Ct. 586 (2007), requires remand.

Before *Booker*, the Supreme Court interpreted 18 U.S.C. § 3742(f)(1) as requiring harmless error analysis of misapplication of the guidelines – which is a procedural error post-*Gall*. *See* ***Williams v. United States***, 503 U.S. 193, 203 (1992). *Williams* addressed a district court's upward departure based on both

prohibited and authorized grounds. ***Id.*** at 196. After finding the error harmless under § 3742(f)(1), the Court reviewed the decision to depart for "reasonableness" under § 3742(f)(2), a review like post-*Gall* substantive review. *See* ***id.*** at 203-04 (reasonableness review involves the appellate court "examin[ing] the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence."). The Court stated that a "sentence thus can be 'reasonable' even if some of the reasons given by the district court to justify the departure from the presumptive guidelines range are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure." ***Id.***

This court has determined that "nothing in *Gall* [] undermines *Williams* or makes harmless-error analysis inapplicable to procedural sentencing errors." ***United States v. Henson***, ___ F.3d ___, ___, No. 07-1993, slip op. at 3 (noting that § 3742(f) was left intact by *Booker*). *See also* ***United States v. Vickers***, 528 F.3d 1116, 1121 (8th Cir. 2008) (applying harmless error post-*Gall*); ***United States v. Greene***, 513 F.3d 904, 908 (8th Cir. 2008) (same); ***United States v. Huff***, 514 F.3d 818, 821 (8th Cir. 2008) (same).

Before *Gall*, this court ruled that plain error review applies to unpreserved *Booker* errors. *See* ***United States v. Pirani***, 406 F.3d 543, 548-49 (8th Cir. 2005) (en banc). *Booker* required sentences to be reviewed only for "unreasonableness." ***United States v. Booker***, 543 U.S. 220, 260-61 (2005). "*Gall* v.

United States calls for an appellate court to conduct two layers of review, first for procedural soundness, then for substantive reasonableness." ***Vickers***, 528 F.3d at 1122 (Shepherd, J., concurring) (citation omitted). Post-*Gall*, this court continues to apply plain-error review to unpreserved procedural errors. *See, e.g.*, ***United States v. Alvizo-Trujillo***, 521 F.3d 1015, 1018 (8th Cir. 2008) (applying plain error post-*Gall*); ***United States v. Burnette***, 518 F.3d 942, 946 (8th Cir. 2008), *petition for cert. filed*, No. 07-11317 (June 4, 2008) (same).

This case illustrates the difficulty of conducting substantive review, after a finding of *Gall* error. The majority finds a *Gall* error here, but does not reverse under plain error review because the record does not indicate that the district court would have given a lower sentence had it been aware of its full authority to sentence outside the guidelines. The majority must then proceed to review the substantive reasonableness of the sentence, based on the district court's explanation of the § 3553(a) factors. *See* ***Gall***, 128 S. Ct. at 597 ("[T]he appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."). Unlike *Williams* where the appellate court could determine whether the authorized grounds alone justified the departure, here the court has no basis to judge whether the sentence is reasonable.

When Bain requested the 60-month sentence, the district court stated, "I can't do that,. . . . if the Court gives [defendants] more than 45 or 50 percent off for

putting their life at risk, the Court of Appeals reverses that as an unreasonable sentence." The district court did not seriously consider Bain's arguments for a 60 month sentence; therefore the entire § 3553(a) explanation is tainted by the *Gall* error. *See* ***Vickers***, 528 F.3d at 1122-23 (Shepherd, J., concurring) (procedural error "thwarts reasonableness review – that is, it cuts off our review process before we even reach the issue of reasonableness"); ***United States v. Langford***, 516 F.3d 205, 213 (3rd Cir. 2008) ("Our reasonableness review relies on a district court's reasoning from the starting point of the correctly calculated Guidelines through the § 3553(a) factors."). The record here does not indicate what sentence the district court believed was "sufficient but not greater than necessary." Due to the deferential abuse of discretion standard, the majority affirms the sentence based on explanations that may not reflect the district court's unrestrained opinion.

District courts must "make an *individualized* assessment" of the correct sentence, and "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." ***Gall***, 128 S. Ct. 586, 597 (emphasis added). Substantive review under *Gall* requires this court to defer to the district court's *unrestrained* opinion about what sentence is "sufficient but not greater than necessary," and the reasons therefor. *See also* ***Rita v. United States***, 127 S. Ct. 2456, 2468 (2007) ("The sentencing judge should set forth enough to satisfy the appellate court that he has considered

the parties' arguments and has a reasoned basis for exercising *his own legal decisionmaking authority*.") (emphasis added).

Since this court has no reliable basis for substantive review, this sentence should be reversed and remanded for resentencing in order to fulfill the mandate of *Gall*. *See* ***United States v. Pepper***, 518 F.3d 949, 953 (8th Cir. 2008) (reversing and remanding for resentencing – without harmless error, plain error, or substantive review – where the district court "procedurally erred by failing to explain adequately [defendant's] sentence and by relying predominantly on improper factors to determine the sentence variance"); ***United States v. Kemp***, 530 F.3d 719, 723 (8th Cir. 2008) (reversing and remanding because "we are not sure that the district court adopted the guidelines range recommended in the PSR"); ***United States v. Garcia-Hernandez***, 530 F.3d 657, 665-666 (8th Cir. 2008) (reversing procedural error of "relying on an erroneous factor" without harmless error, plain error, or substantive reasonableness analysis). *Cf.* ***United States v. Thomas***, 524 F.3d 855, 860 (8th Cir. 2006) (reversing and remanding *Kimbrough* error because it was unclear whether it would have varied from the guidelines range had it know [sic] it had the authority); ***United States v. Robertson***, 517 F.3d 990, 995 (8th Cir. 2008) (reversing and remanding *Kimbrough* error because "[w]hen a district court does not consider an argument because it is unaware of its power to do so, [ ] remand is appropriate.").

Because this circuit's precedent requiring plain error review of unpreserved *Gall* error does not allow a remand, I concur in the result.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- DONALD BAIN JR., Defendant.	CRIMINAL NO. 3:05-cr-582 TRANSCRIPT OF PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS, held before the Honorable John A. Jarvey, at the Federal Courthouse, Davenport, Iowa, commencing at 10:57 a.m., August 9, 2007, reported by Linda Faurote-Egbers, Certified Shorthand Reporter and Notary Public for the State of Iowa.

APPEARANCES

Plaintiff by: JOEL W. BARROWS
Assistant United States Attorney
131 East Fourth Street
Davenport, IA 52801

Defendant by: WILLIAM G. SCHICK
Attorney at Law
423 17th Street
Rock Island, IL 61201

Reported by:

Linda Faurote-Egbers
Certified Shorthand Reporter

[2] THE COURT: Please be seated. We are here in the matter of the United States of America versus Donald Bain, it is Criminal Case 05-582. Mr. Bain is before the Court for sentencing based on his plea of guilty on December 13, 2006, to Counts 1 and 2 of the December 14, 2005, Indictment. He is present and represented by William Schick and the government is represented by Joel Barrows.

Mr. Bain, you understand that you are before the Court today to be sentenced for your crimes?

THE DEFENDANT: Yes, sir.

THE COURT: I have received the Presentence Report and have reviewed it in its entirety. I have also received the packet of exhibits that was requested to be reviewed by counsel for the defendant.

Mr. Barrows, are you aware of any reason why sentence cannot be imposed today?

MR. BARROWS: No, Your Honor.

THE COURT: Mr. Schick, are you?

MR. SCHICK: No, Your Honor.

THE COURT: Mr. Schick, did you review the Presentence Report with your client in its entirety?

MR. SCHICK: Yes, Your Honor.

THE COURT: Did you find any factual inaccuracies that need to be resolved here today?

MR. SCHICK: No, Your Honor.

[3] THE COURT: Mr. Barrows, are you aware of any factual inaccuracies?

MR. BARROWS: No, Your Honor.

THE COURT: I accept then the Presentence Report as accurate in its entirety. Based on that, Mr. Bain has a total offense level under the Sentencing Guidelines of 37, criminal history category of I, which would ordinarily yield a Guideline range of imprisonment from between 210 to 262 months.

I would hear from you first, Mr. Schick, then from Mr. Bain and then from Mr. Barrows on the sentence to be imposed.

MR. SCHICK: Thank you, Your Honor. On February 9th of 2005 a search warrant was served on Mr. Bain's residence where he and his wife who is present in court today resided. From that time on we gave full cooperation to the government. He was interviewed on February 9, 2005, by a Special Agent Langdon. He was cooperative, he helped the agents locate what they were looking for. Then a period of time went by when there was no charge filed until December 14th I believe of 2005.

During that period of time, 2005, Mr. Bain believes in his recollection that he left the country twice, he works for Stanley Consultants, engineering firm out of Muscatine, Iowa, and he was sent out of the country on two occasions, returned, just normal routine business for him.

After the arraignment on the Indictment in 2005 the defendant and I met with Special Agent Kaiser of the FBI on [4] January 15, 2006; on January 25th of 2006; on May 17th of 2006; we met again in my office because he wanted to use my computer to try – Agent Kaiser was trying to find out if there was any of the websites or the Internet sites that were on – were involved in this case, if any information could be obtained that would be helpful to the government. We met in my office on June 29, 2006, again on August 30, 2006.

After the August 30th meeting Agent Kaiser and Don Bain went to the Rock Island Public Library to see if they could use their computer because they were having trouble getting on to some of these or sites and at that time Don offered Mr. – Agent Kaiser the opportunity to come out to Muscatine if he wanted to use his wife's computer. Agent Kaiser then turned whatever information he had over to other authorities or the U.S. Attorney's Office and apparently nothing helpful came out of that.

Nevertheless there was a continued effort by my client to aid the government and furnish all the information he was capable of furnishing from his records, from his computers, from his memory.

This is an unusual case with an unusual situation. The defendant was granted use of his passport continuously, traveled outside the country several times with permission of the Court, all of which I believe are docketed. I believe Federal Probation Officer

Donohoo presented every request for [5] travel to Judge Shields and most likely it is docketed in the court records, all those travel plans were approved.

Besides 2005 which there was no docket entries made because there's no charge filed yet, starting in 2006 after his first court appearance, Don was granted permission of the Court to travel to the United Arab Emirates in the Middle East in March of '06; went to Kuwait City in April of '06; went to Kuwait City in May of '06; went back to the United Arab Emirates in May of 2007; and in between time made several in-country trips which didn't require Court approval because his bond allowed him to travel inside the United States, but he always furnished Mr. Donohoo with the information where he was going.

He went to Beale Air Force base in California in August of '06; went to Vandenberg Air Force base in June and again in July of '07; went to Atlanta in August of '07. All of these were contracted business between the U.S. Army Corps of Engineers for master planning for the United States Air Force and Stanley Consultants and Mr. Bain was sent representing Stanley Consultants.

In addition to that there were a couple trips he reported to the Federal Probation Office to Kansas and Texas which were just relatives, visiting relatives, but it was an understanding between the Probation Office and Mr. and Mrs. Bain that any travel he had, even within the country, as a courtesy he

would let the probation office know where he was going and [6] when he would be gone.

Title 18, Section 3553, states that the Court should impose a sentence sufficient but not greater than necessary to comply with the purposes set forth in that section. It is my suggestion to the Court that this is a different case involving a very different individual where Guideline recommendations should not be followed.

There is a mandatory minimum 60 months that the statute requires and a sentence any greater than that I believe would exceed the purpose of Section 3553 and Mr. Bain does not require a higher sentence to straighten out his conduct or his thinking or his attitude or his criminal history. He has absolutely none.

This particular case closed out his career and his family life, he knows he is here to have a sentence imposed, he knows he is going to jail. It is – he has a statement he would like to make which he can express his feelings about it much better than I can.

I bring out all of this information and the Court has seen it all looking through the Presentence Report and the other exhibits and examining the docket sheet to see that as we sit here today Mr. Bain still has his passport which he brought today in case he surrendered to the Court; but if he is allowed to continue to travel because he's trustworthy

THE COURT: We have had no trouble with him and I have [7] visited with probation at great length about that. As we typically don't with people accused of this crime, that category of which that we can release on pretrial release, we're pretty, you know, Federal Courts are pretty agressive [sic] about detaining them if there is evidence of pedophelia [sic] or other problems associated with the crime. This is the crime in probably its most basic form but for the large number of images that were recovered here.

MR. SCHICK: A comment I would have on the images is that the evidence does show a large number of images, but a rather small number of more objectionable images that might aggravate. There would be a handful or two of images that would qualify, but part of the aggravation is the number. I understand. That we don't contest. We don't have 600 aggravating photographs, we have 600 child pornography photographs which puts it into a category of its own.

I urge the Court under the circumstances and the facts of this case and what is presented to the Court to impose a minimum mandatory 60 months.

THE COURT: I can't do that. Hang on. In order to go below the Guidelines pursuant to 3553 which are viewed in the Eighth Circuit now as affirmed by the United States Supreme Court as presumptively reasonable, there's got to be a ground for a variance. I mean, what are the grounds for a

variance of as much as two-thirds to three-fourths of the sentence under the [8] Guidelines?

MR. SCHICK: Well –

THE COURT: People who cooperate and put their life at risk, if the Court gives them more than 45 or 50 percent off for putting their life at risk, the Court of Appeals reverses that as an unreasonable sentence. Here what would the grounds be for a variance of the magnitude you are talking about?

MR. SCHICK: A grounds for variance that make it acceptable in the Guidelines does not exist. What exists is I guess the outstanding character of Mr. Bain, the history of the last two years of what he's done while he's been on release, his responsibility to – his continued reporting to probation, he is the kind of person that a long sentence is not necessary to change because this situation is an aberration. It's something he did in the privacy of his basement that he did not realize the seriousness of it, although he doesn't deny he knew it was illegal.

He is an individual that stands out in my experience of handling criminal defense cases as a person that but for these Guideline recommendations, but for mandatory minimums, he's a prime candidate for probation; but this particular offense doesn't permit it.

THE COURT: Thank you, Mr. Schick. Mr. Bain, is there something you'd like to say in your own behalf before the Court imposes sentence?

[9] THE DEFENDANT: Given this opportunity I'd like to convey my thoughts regarding the situation –

THE COURT: Pull the microphone closer.

THE DEFENDANT: – that I find myself in. I feel I've been a productive member of society, I practiced my architectural profession for over 22 years and provided services to communties [sic] in which I've lived, commercial industry, the United States Government, including the war on the effort in Iraq.

I believe I've been a good husband and a decent father to my children, my marriage. I am a family-oriented individual that thinks a lot of values. I believe the fact that my wife has remained by my side through all this provides testament to that fact.

I acknowledge and understand that this is a terrible situation. I feel shame, embarrassment, and utter discontent with my actions. I have no other explanation than to admit that I feel I fell victim to the entry of unlimited information available on the Internet. The Internet is an environment that has no bounds, has no walls, provides no warnings. There are no legal speed limit signs posted on the Internet.

As I have been a law abiding person all my life I admit I was naive towards not what is considered moral and illegal, but the line between moral and illegal. I can tell you with all certainty that a phone call from a legal entity stating [10] that what I was doing had this harsh of legal ramifications and what

it means I immediately stopped, only a phone call, not a search warrant.

I am not trying to blame the legal system, I am not trying to spread blame away from myself because I should have known, I should have realized, I should have not only stopped, but never started.

THE COURT: How did you get started?

THE DEFENDANT: It was Internet chat rooms, exchanging files. They weren't all this type of files. Some of these files became intermingled in those files. To say continually is that it was more of utter dismay of wondering how far this type of information would go. I was astonished by it. I was intrigued by it. I was passing a wreck on the freeway. I am not blaming anyone but myself for my actions. I am, however, trying to convey my thoughts of how I got here.

I can tell you that since February 2005 when authorities entered my house with a search warrant as you might expect my life has turned upside down. Those offenses has [sic] caused me to sacrifice my career and undoubtedly negatively affected relationships with friends, past employers, past co-workers, and certainly family. Efforts to provide and as well as psychological evaluators have been costly in terms of finances, time, and most importantly mentally. Even with all this the punishment to this point has largely been provided by [11] myself to myself.

I've been kicking myself for allowing myself to be put in this situation. I should have known better. In kicking myself for ruining myself which seemed to have promise, kicking myself for destroying respect of family, friends, and co-workers, and kicking myself for ruining my financial status. I have been kicking myself for putting my wife through all of this. Because of my actions I will be unable to provide for my wife.

My wife – my life as I know it is over. My work and career has been very important to me as well as relationships developed during that effort. Change is inevitable. Negative change is punishment. For me this process has been to date severe punishment. It has already taken place. Through the legal system has provided more than enough punishment for me to ensure that this will never happen again.

I'm sure that I will try my hardest to be the best community servant I can be or be allowed to be. I am sure that I will never want to cause any – want any cause for any connection with law enforcement ever again. And it's ensured that I will live my life as I did prior to this offense without knowing a lawyer.

What's to become of me now, you decide. Regretably [sic] I am here, regretably [sic] we are all here. Taking your time and all the other time, all the other people involved in this whole [12] effort, regretably [sic] taking their time, I apologize for that. I apologize for my actions.

THE COURT: Thank you, Mr. Bain. Mr. Barrows?

MR. BARROWS: Thank you, Your Honor. Just a few comments, Your Honor. Mr. Schick did refer to this as an aberration. The government would take issue with that. I don't believe that this was an aberration. There is evidence that this behavior had gone on for some time.

This is a puzzling, troubling case, maybe as much what the defendant has thrown away here as for his conduct. Mr. Schick is correct, the defendant did try to cooperate. He made a sincere effort in that regard. The information was simply too old. There was no substantial assistance in this case and there will be no Motion in that regard.

Mr. Schick has discussed Mr. Bain's travels while he's been on pretrial release and it is true that he has been compliant, however, I would suggest the fact that the defendant has been rather generously accommodated in terms of his pretrial release conditions and work-related travels is of limited relevance to his sentence.

The Guidelines applicable in this case, Your Honor, do seem to adequately address the 3553(a) factors. That said, the government does believe that the low end of the Guidelines seem to meet the criteria of 3553(a) in this case.

Mr. Bain's comments here today do seem to indicate [13] that he rather thoroughly understands the

ramifications of his behavior so for those reasons, Your Honor, the government would be content with the low end of the Guidelines in this particular case. Thank you.

THE COURT: Thank you. It is a terribly painful Presentence Report to read because of what you are throwing away here. You said there's no legal speed limit on the Internet. That's true enough, but you have had the benefit your whole life of loving, supportive relationships and you had a moral compass that was better than any speed limit sign on the Internet. You knew when you were doing it that it was wrong, you just didn't know how serious the punishment is for this offense and so you are right, you have – you're going to pay dearly, your wife is going to pay dearly, everybody associated with you is going to pay dearly and it is painful because you were by all accounts very successful, a contributing member to your community, certainly to your workplace, it is harsh.

I have considered the nature and circumstances of this offense and the history and characteristics of this defendant. I have considered the seriousness of the offense and note in that regard that the number of images involved here and the amount of trading of files puts this case above the garden variety, the offense in its most basic form.

The Court has also considered the question of just punishment. The Court looked at the Presentence Report very [14] hard to see any evidence of

pedophelia [sic] or anything like that that would exacerbate this situation, aggravate the sentence.

I have considered the issue of adequate deterrence to criminal conduct as I must and to the extent that a sentence of imprisonment can do such a thing in these cases, it will certainly have that effect.

I have considered the need to protect the public from further crimes and rely heavily in that regard on the psychosexual investigation that was conducted in this case and which indicated that the – that Mr. Bain has a low risk for other problems and high likelihood for successful rehabilitation.

I have considered the sentencing options that are available. I have also, of course, considered the kind of sentences and the advisory sentencing range established by the Guidelines. The Sentencing Guidelines are presumed reasonable here in the Eighth Circuit Court of Appeals. They are not mandatory, but they are based on extensive study and refinement. They exhibit the will of Congress and they promote consistency in sentencings. Accordingly the Court looks to those Guidelines as an important though not singularly controlling factor to be considered.

The Court has also examined the need to avoid unwarranted sentencing disparity among defendants with similar records who have been found guilty of similar conduct. We have [15] had quite a number of people that are very similarly situated to Mr. Bain, successful, hard working, family people that get caught up in this and so we have a track record here

in Federal Court and all across the Southern District of Iowa and it is, of course, important pursuant to the Guidelines and pursuant to Section 3553 to promote consistency among those sentences.

I conclude that the Guideline system adequately addresses the circumstances of this defendant and the Sentencing Guideline range is reasonable. Based on all the circumstances of this case the Court concludes that a sentence at the bottom of the range is sufficient to address the essential sentencing considerations.

It is therefore the judgment of the Court that Donald Bain is hereby sentenced to the custody of the Bureau of Prisons for a term of 210 months on Count 1 of the Indictment and 120 months on Count 2, those sentences to run concurrently, meaning at the same time.

Upon release from imprisonment you shall be placed on supervised release for a term of 10 years. Within 72 hours of release from the custody of the Bureau of Prisons you shall report in person to the probation office in the district to which you are released.

While on supervised release you shall not commit another federal, state, or local crime. You shall not possess a firearm or other destructive device and shall not illegally [16] possess a controlled substance. You shall abide by all the standard conditions of supervised release set out by the Sentencing Commission plus the following special conditions: You

shall participate in and follow the rules of sex offender treatment as directed by the probation office. Sex offender assessments and treatments shall be conducted by therapists and polygraph examiners approved by the probation office who shall release all reports of such activity to the probation office.

You shall sign releases of information to allow professionals and law enforcement officers involved in your assessment, treatment, and behavioral monitoring to communicate and share documentation with each other. You shall comply with all sex offender laws for the state in which you reside.

You shall not view or possess any form of pornography, sexually stimulating or sexually oriented material. You shall not enter any location where pornography or erotica are the primary products for purchase or viewing. You shall not enter locations whose primary function is to provide so-called adult entertainment.

You shall obtain residences as approved by the probation office. You shall not utilize any sex-related adult telephone services, websites, or electronic bulletin boards. You shall provide the probation officer access to any financial records to ensure compliance with these conditions.

You shall not associate with anyone engaged in the [17] exploitation of minors. You shall not have any contact with a child under the age of 18 unless accompanied by a responsible adult who is aware of

your conviction and supervision status and who has been approved in advance by the probation office.

You shall not possess any type of camera or video recording device without probation approval. You shall not have access to or possess a computer at home or elsewhere without prior written approval of the probation office. You are not to possess or use a computer or any other device with a network card, modem, wireless card, or the like at any location without prior approval of the probation office.

You shall submit to a reasonable search of your property to ensure that you are in compliance with this condition. If you are not released through a community corrections center program while in the custody of the Bureau of Prisons, you shall reside, participate, and follow the rules of a community corrections center program as directed by the probation office for up to 120 days.

If approved to use a computer system in any way, you shall not use it in violation of the conditions of supervised release or in a criminal manner. You shall notify the probation office of any locations where you receive mail or the like matter. You shall not obtain employment or volunteer where you would be supervising, working with, or associating with people under the age of 18 and you shall participate in a program of [18] curfew supervision and/or electronic monitoring for the duration of your term of supervision as approved by the Court annually. All is more specifically

set forth in the Judgment and Commitment Order to be filed later today.

The Court finds that the defendant does not have the ability to pay a fine. He is ordered to pay $200 special assessment to the Victims Assistance Fund due and payable immediately without interest to the Clerk of Court for the Southern District of Iowa. He is remanded to the custody of the United States Marshal for execution of this sentence.

Mr. Schick, do you have a recommendation or a request with respect to the place of incarceration? Typically the best thing I think we can say right now is that we ask that he be incarcerated as close to home as possible.

MR. SCHICK: I have two requests, one that he be allowed to voluntarily surrender upon giving notice of where his sentence will be served so he can remain with his family until the sentence is to begin rather than taking him in custody today and the second request would be a minimum security facility as close as possible to Springfield, Missouri, where his wife will be residing.

THE COURT: We will ask that that sentence be served as close to Springfield, Missouri, as possible. Of course, there is a federal institution there, it is my recollection that that is primarily a medical institution so I don't know if they [19] will do it so I will recommend that he be incarcerated as close to Springfield, Missouri, as possible.

Request for self-surrender is denied. He has had a year and a half to get his life in order. We understand he has recently quit his employment. The probation is frankly concerned about his emotional condition right now. He's had time to get his affairs in order. It is time to go now.

You have the right to take an immediate appeal from this Order. Any appeal has to be filed within ten days from the entry of written Judgment. Judgment will be entered as I said either later today or at the latest first thing tomorrow.

Mr. Schick, do you have anything else?

MR. SCHICK: No, Your Honor.

THE COURT: Mr. Barrows?

MR. BARROWS: No, Your Honor.

THE COURT: Thank you. We are in recess.

(Proceedings concluded at 11:28 a.m., August 9, 2007.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2981

United States,

Appellee

v.

Donald W. Bain, Jr.,

Appellant

Appeal from U.S. District Court for the Southern District of Iowa – Davenport (3:05-cr-00582-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton would grant the petition for rehearing en banc.

Judge Melloy did not participate in the consideration or decision of this matter.

October 06, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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ORDER

(Filed Jan. 13, 2010)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Shepherd would grant the petition for rehearing en banc.

Judge Melloy did not participate in the consideration or decision of this matter.

January 13, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans